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19,771.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 25

Supreme Court U. S.
FILED
MAR 10 1906
JAMES H. MCKENNEY,

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY,
Appellant,

v.

WILLIAM H. CLARK, MORRIS A. SPOONTS, CHARLES A. CULBERSON, AND PHILLIPS INVESTMENT COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANT.

LOCKE & LOCKE, Dallas, Texas,
SOLICITORS FOR APPELLANT.

Supreme Court of the United States.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY
v.
WILLAM H. CLARK ET AL.

19,771.
October Term, 1905.
No. 270.

BRIEF FOR APPELLANT.

PRELIMINARY STATEMENT.

1.

INTRODUCTORY.

In November, 1896, William A. Hunter procured from The Fidelity Mutual Life Association of Philadelphia, $15,000 of insurance upon his life in favor of his sister, Mrs. Jennie M. Mettler. In December, 1896, he disappeared under circumstances indicating his death by accidental drowning. Thereafter Mrs. Mettler instituted an action against the association upon the policies, and in July, 1900, she recovered in the Circuit Court of the United States for the Northern District of Texas, a judgment thereon for $21,550. In May, 1902, this court affiirmed the judgment: Fidelity Mutual Life Association v. Mettler, 185 U. S. 308. In June, 1902, the association, which in the meantime had changed its name to The Fidelity Mutual Life Insurance Company by an amendment of its charter, paid into the registry of the court the sum of $24,028.25, for the satisfaction of the principal and interest of the judgment. This sum was immediately distributed by the clerk among Mrs. Mettler and her

assigns, the defendants in the present suit. In April, 1903, William A. Hunter was captured in Birmingham, Alabama, near which city he was living under an assumed name. In May, 1903, the insurance company began this suit against Mrs. Mettler, who by remarriage had become Mrs. Jennie M. Smythe, and against all the other original distributees of the fund deposited in the court. The object of the suit was, (1) to restrain the defendants from making use of the judgment at law recovered by Mrs. Mettler as the basis of a plea of res adjudicata in any proceeding brought to reclaim the money paid under the judgment, and (2) to obtain a decree against each person who had received any of the money directly from the court, requiring him to restore the amount so received, together with interest thereon. All the parties defendant in the suit demurred, and upon the overruling of their demurrers answered. The case was heard upon the evidence, and resulted in a decree in favor of the insurance company as to Mrs. Smythe and her husband, but against the insurance company as to all the other defendants. From so much of the decree as denies to the insurance company a recovery of the moneys received by the defendants other than Mrs. Smythe, this appeal has been taken.

The jurisdiction of the Circuit Court of the United States for the Northern District of Texas was invoked because the requisite diversity of citizenship existed, and because in its nature the suit was ancillary to the original action at law in that court. The case has been brought directly to this court from the Circuit Court because it involves the construction or application of the Constitution of the United States.

For the convenience of the court, we copy here the plaintiff's bill, inserting in the proper places the averments of the two amendments made thereto, but omitting the caption, the verification, and the exhibits.

2.

THE PLAINTIFF'S BILL AS AMENDED.

"To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Texas:—

1.

The Fidelity Mutual Life Insurance Company, of Philadelphia County, Pennsylvania, and a citizen of the state of Pennsylvania, brings this its bill against Jennie M. Smythe and James N. Smythe, her husband, both of Licking County, Ohio, and both citizens of the state of Ohio, and William H. Clark and Charles A Culberson, both of Dallas County, Texas, and both citizens of the state of Texas, and Morris A. Spoonts, of Tarrant County, Texas, and a citizen of the state of Texas, and Phillips Investment Company, of Jackson County, Missouri, and a citizen of the state of Missouri. And thereupon your orator complains and says:—

2.

The plaintiff is a private corporation which long prior to the year 1896 was duly incorporated by the state of Pennsylvania under the name of The Fidelity Mutual Life Association of Philadelphia, and which on to-wit August 22, 1899, by amendment of its charter changed its name to The Fidelity Mutual Life Insurance Company, without, however, in any way losing its identity. Ever since a date anterior to the year 1896, the plaintiff has been transacting a life insurance business in the state of Texas by authority of said state. The defendant, Jennie M. Smythe, was married to the defendant, James N. Smythe, on or about March 26, 1903. Continuously from a date prior to October, 1896, until her said marriage, she was a widow and was named Jennie M. Mettler. The defendant, Phillips Investment Company, is a private

corporation duly incorporated by the state of Missouri long prior to October 29, 1901.

3.

1. In the latter part of October. 1896, one William A. Hunter, a brother of the defendant, Jennie M. Smythe, and then residing with her in Reeves County, Texas, visited the Texas office of the plaintiff in the city of Dallas, and there renewed an old acquaintance with the plaintiff's general agent Andrew J. Brown. He told said general agent that he was a farmer and real estate dealer; that he and his brother-in-law had purchased a considerable amount of land in the Pecos valley, and owed a good deal of money on the same; that his brother-in-law had died; that if he should die his sister, the said defendant, would lose what they had paid; and that for this reason he thought of taking insurance upon his life in order that his said sister might be able to pay the amount owing upon the land if he should die. Said statements were materially false, and were made to deceive said general agent, and did deceive him and lead him, and through him the plaintiff, to believe that the said Hunter had a legitimate reason for procuring upon his life a considerable amount of insurance in favor of his said sister.

2. In pretended pursuance of said purpose, the said William A. Hunter, on to-wit October 28, 1896, made written application to the plaintiff, through its said general agent, for three policies of insurance upon his life, each to be of the sum of five thousand dollars, and all to be payable to his said sister. The plaintiff accepted his proposition so made, and under date of October 31, 1896, issued to him its three policies numbered respectively D 73372, D 73373, and D 73374. By each of said policies the plaintiff promised that, subject to certain conditions not relevant to the present bill, within ninety days after its acceptance of due and satisfactory proof of the death of said William A.

Hunter, it would pay to his said sister, Jennie M. Mettler (now the defendant, Jennie M Smythe), the sum of five thousand dollars if she should survive him. On to-wit November 7, 1896, the plaintiff, through its said general agent, delivered said policies to said William A. Hunter, and received from him the first semi-annual premium thereon, amounting to ninety-seven and 65/100 dollars.

4.

1. On to-wit December 3, 1896, said William A. Hunter left the residence of the defendant, Jennie M. Smythe, in the town of Pecos, Texas, ostensibly to go for a trip of a week or ten days to a place in Loving County, Texas, about forty miles from Pecos. He took with him two horses, a wagon, camping utensils, and provisions for himself and team. After crossing the Pecos river near the town of Pecos and traveling for a distance of about fourteen or fifteen miles along the public highway leading to said point in Loving County, he left said highway and drove off about half a mile to a point near the east bank of the Pecos river. There he pitched a camp, and so arranged his bed, camp fire, camping utensils, food, and other provisions as to indicate that he had camped there over night. He removed the harness from the horses and left it lying on the ground near the wagon, and tying one horse to a tree left it so that it should afterwards be found dead with the appearance of having perished from starvation. He then walked down to and over the upper edge of the steep bank of the river, leaving his footsteps plainly imprinted in the sand, and carefully made his way thence without leaving any trail, so that it should appear to anyone examining the camp that he had fallen into the river and been drowned. The other horse was found soon thereafter in the town of Barstow, a station on the Texas and Pacific Railway, whither, as the plaintiff

verily believes, he had ridden it on the night of December 3, 1896, turning it loose near said town with no accoutrement save a dangling rope, so that it should appear to have strayed from the camp.

2. Immediately after stealing away from his camp as aforesaid, William A. Hunter went into hiding, quitting the state of Texas, assuming a fictitious name, and ever thereafter concealing himself, so that he should not be found by the plaintiff, and so that the plaintiff and the public should not know that he was still alive but should believe that he was drowned in the Pecos river on the morning of December 4, 1896.

3. All this he did with the intent and purpose that his said sister, the defendant, Jennie M. Smythe, should represent to the plaintiff that he had been so drowned, and should make demand upon the plaintiff for the sum of fifteen thousand dollars in payment of its said policies, and should so deceive the plaintiff as to cause it to pay her said sum of money in the belief that he had been so drowned; and with the further intent and purpose that, if it should decline to pay the same, she should so impose upon and deceive the courts, and the judges and juries composing the courts, that they should believe he had been so drowned, and should compel the plaintiff to pay said sum together with all the interest, penalties, and costs to accrue thereon; and with the further intent and purpose that when she should have collected the proceeds of said policies the same should be divided between her and himself to the dishonest enrichment of them both.

4. Within the last few days the plaintiff has for the first time learned numerous facts and circumstances which give it strong reason to believe, and verily it does believe, that said William A. Hunter and his sister, the defendant, Jennie M. Smythe, conspired together from the beginning, and concocted

together this entire scheme of fraud, and that every step therein taken, from the first visit of said Hunter to the plaintiff's office in Dallas to the final collection and division of the money, was taken in pursuance of their mutual understanding and agreement.

5.

1. Thereafter, in or about the month of January, 1897, in pursuance of said fraudulent plan, and in ratification and adoption thereof, the defendant, Jennie M. Smythe, presented to the plaintiff her affidavit in due and regular form, as required by said three policies, showing that said William A. Hunter had died by drowning in said Pecos river on or about December 4, 1896, and made demand upon the plaintiff that it pay to her the sum of fifteen thousand dollars as and for the amount which his death had rendered due from it to her upon account of said three policies. Not being satisfied that said Hunter was dead, the plaintiff refused to make such payment.

2. Thereupon, on to-wit December 2, 1898, the said defendant, Jennie M. Smythe (whose name then was Jennie M. Mettler), instituted in the District Court of Dallas County for the Forty-fourth Judicial District of Texas against the plaintiff (whose name then was The Fidelity Mutual Life Association of Philadelphia), a suit in the nature of an action at law to recover from it upon account of said policies said sum of fifteen thousand dollars, together with interest, damages, and costs. On to-wit January 4, 1899, said suit was by the order of said district court duly removed to the Circuit Court of the United States for the Northern District of Texas, sitting at Dallas. There it remained for trial, being numbered 2118 upon the law docket of said court, and entitled Jennie M. Mettler v. The Fidelity Mutual Life Association of Philadelphia.

3. Said action was tried on May 28, 1900, and several succeeding days, on the following named pleadings, to-wit: the plaintiff's First Amended Original Petition, filed November 11, 1899, the defendant's Second Amended Original Answer, filed May 28, 1900, and the plaintiff's Amended First Supplemental Petition and defendant's Supplemental Answer, both filed May 28, 1900. A substantially correct copy of said pleadings, marked Exhibit A, is attached to and hereby made a part of this bill. In her said First Amended Original Petition the plaintiff alleged that the said William A. Hunter died on or about the fourth day of December, 1896; and in its said Second Amended Original Answer the defendant denied said allegation. The issue of fact so made was vital to the plaintiff's right of recovery, formed the principal subject of controversy at said trial, and was the only issue pertinent to this bill.

4. In support of her said allegation, the plaintiff in said action (here a defendant) introduced witnesses who gave a detailed account of the appearance of the camp arranged by William A. Hunter, as briefly set forth in Section 4 of this bill. She herself also as a witness described said camp, and recounted the circumstances attending the departure of Hunter from Pecos, her institution of a search for him, and her discovery of the policies sued upon, all in such a way as to lead the court, and especially the jury, to believe that said Hunter had in fact been accidentally drowned in the Pecos river on the morning of December 4, 1896. She, also, on or about December 30, 1896, wrote a letter to her father in Ohio, stating that said William A. Hunter had been drowned, and relating the circumstances tending to establish that fact as above mentioned; and so she created a family reputation that he had been drowned in the Pecos river on December 4, 1896. At said trial she introduced the depositions of several members of the family

proving the existence of such a family reputation, and herself testified to its existence.

5. The only evidence produced at said trial tending to establish as a fact the death of William A. Hunter was the evidence of the circumstances connected with his disappearance, the evidence of the family reputation that he was dead, and the fact that during the period of more than three years elapsing between his disappearance and said trial the defendant company had been unable to procure any direct and positive proof which the jury deemed worthy of credit that he had not died as alleged. But said family reputation was based entirely upon said circumstances and the statement thereof made by the plaintiff herself to the other members of the family. And said circumstances in turn, each and all, were manufactured by said Hunter, with the deliberate and carefully planned design of deceiving the defendant company, and deceiving the courts, and by means of such deceit swindling the defendant company out of the sum of fifteen thousand dollars or more for his own benefit and that of his said sister. The inability of the defendant company to procure convincing evidence of the fact that said Hunter had not been drowned but was still living was due solely to the studious care with which said fact was concealed by him, and as the plaintiff verily believes by her as well.

6. The plaintiff has much reason to believe, and verily it does believe, that the defendant, Jennie M. Smythe, knew at all times that her brother, the said William A. Hunter, was not dead; and that she knew where he was, and maintained a regular correspondence with him at all times during the pendency of said litigation; and that she actively and diligently aided him in planning and carrying out said fraudulent scheme and concealing himself from the plaintiff; and that both by deliberate concealment and by direct perjury she withheld from the court the true

facts as the same were known to her, and prevented the plaintiff from procuring evidence to establish its defense.

7. Said trial resulted on June 2, 1900, in a verdict of the jury in favor of the plaintiff, procured from it by her solely by means of the frauds aforesaid. Upon said verdict, after the allowance of a remittitur of three thousand three hundred seventy-five dollars, a judgment was on July 4, 1900, duly entered by said Circuit Court that the plaintiff (here the defendant, Jennie M. Smythe) recover from the defendant (here the plaintiff) twenty-one thousand five hundred fifty dollars, together with interest thereon at the rate of six per centum per annum from and after said date, and all her costs of suit, and that she have execution therefor. Said sum was made up of fifteen thousand dollars allowed as the face of said three policies of insurance, two thousand two hundred fifty dollars allowed as legal interest thereon, and four thousand three hundred dollars allowed as attorneys' fees and damages, which in the exercise of its inscrutable wisdom the legislature of Texas had imposed upon the defendant company for failing to pay the plaintiff's claim promptly.

8. After the return of said verdict and before the entry of final judgment thereon, the defendant company filed a motion and an amended motion for a new trial of said cause; both of which motions were overruled by the court on June 25, 1900. Thereafter the defendant sued out a writ of error for the revision of said judgment by the Supreme Court of the United States. Said cause was heard by said Supreme Court as No. 165 of its October Term of 1901, and on May 5, 1902, the judgment of the Circuit Court was in all things affirmed by the Supreme Court.

9. Thereafter, on to-wit June 3, 1902, the defendant company (here the plaintiff) paid into the registry of said Circuit Court the sum of twenty-four

thousand twenty-eight and 25/100 dollars, being the principal sum of said judgment with all interest thereon accrued; and said sum was by the clerk of said Circuit Court on the said date paid to and distributed among the plaintiff in said cause and her assigns as hereinafter set forth. In addition to said sum the defendant company made sundry payments of accruing costs from time to time during the pendency of said litigation, and soon after its conclusion; and so it has discharged said judgment with all the costs of court, amounting to about one thousand five hundred dollars.

6.

1. On to-wit June 10, 1899, the defendant, Jennie M. Smythe (then Jennie M. Mettler, the plaintiff in said action at law), by a written instrument assigned and transferred to William L. Hall and the firm of Alexander, Clark & Thompson an interest in her said claim against the present plaintiff to the extent of one-third of the amount recovered for principal, interest, and statutory damages, plus two thousand five hundred dollars, plus any amount recovered for attorneys' fees. Said assignment was made as a part of a contract of employment, and to compensate the assignees for professional services rendered and to be rendered to the assignor in prosecuting her said claim against the present plaintiff, all the assignees being lawyers by profession, and being her attorneys in said litigation. In said written instrument it was further stipulated that the assignees might employ such associate attorneys as they should deem necessary, but only at their own expense for the fees of such associate attorneys.

2. Said firm of Alexander, Clark & Thompson was composed of William M. Alexander, William Thompson, and the defendant, William H. Clark. On to-wit May 29, 1902, said William M. Alexander,

William Thompson, and William L. Hall by a written instrument assigned and transferred to the defendant, William H. Clark, all their interest in said contract of employment and in the judgment hereinbefore described.

3. In the meantime, the defendants, Morris A. Spoonts and Charles A. Culberson, had been employed as associate attorneys under the provisions of said contract, and as such had rendered professional services in said litigation. As compensation for the services by them severally rendered, the defendant, William H. Clark, assigned and transferred to the defendant, Morris A. Spoonts, an interest of one thousand five hundred dollars in his share of the money paid into the court by the present plaintiff as aforesaid; and the defendants, Jennie M. Smythe and William H. Clark, assigned and transferred to the defendant, Charles A. Culberson, an interest of one thousand twenty-six dollars in said judgment and cause of action and said fund therefrom arising.

4. On to-wit October 29, 1901, the defendant, William H. Clark, being indebted to the defendant, Phillips Investment Company, upon his promissory note for the principal sum of one thousand four hundred seventy-one and 57/100 dollars, by a written instrument assigned and transferred to said Phillips Investment Company, as collateral security for said note, his entire interest in said judgment.

5. In pursuance of said transfers, the clerk of said Circuit Court on to-wit June 3, 1902, paid out as follows the said sum of twenty-four thousand twenty-eight and 25/100 dollars, which the present plaintiff had deposited in court to discharge said judgment as above set forth. He paid to the defendant, William H. Clark, the sum of eight thousand three hundred forty-six dollars; to the defendant, Morris A. Spoonts, the sum of one thousand five hundred dollars; to the defendant, Charles A. Cul-

berson, the sum of one thousand twenty-six dollars; to the defendant, Phillips Investment Company, the sum of one thousand five hundred forty and 25/100 dollars; and to the defendant, Jennie M. Smythe, through William H. Clark, as her attorney of record, the remaining sum of eleven thousand six hundred sixteen dollars. No one of the defendants ever has returned to the plaintiff, directly or indirectly, any portion of the money so received by him, but each has converted to his own use the entire sum paid to him:—saving, however, that the defendant, Jennie M. Smythe, as the plaintiff has strong reason to believe, and verily does believe, has paid over to her said brother and co-conspirator, William A. Hunter, a large portion of the money so received by her.

7.

1. The said William A. Hunter was not drowned on December 4, 1896, as alleged and found by the jury in said action at law, but he still lives. At the date of filing this bill he is confined in the jail of Jefferson County, Alabama, by virtue of a warrant issued by the governor of Alabama for his arrest and surrender to the extradition agent of the state of Texas, to be tried in Texas upon a charge of swindling this plaintiff in the manner hereinbefore set out. He is so confined pending an appeal by him taken to the Supreme Court of Alabama from an order of the trial court refusing to discharge him upon a writ of habeas corpus. The fact that he still lives forms a complete and absolute defense to the action brought by the defendant, Jennie M. Smythe, against the plaintiff, in which said judgment was rendered.

2. Said fact was not discovered by the plaintiff, and was not known to the plaintiff or to any of its officers, attorneys, or agents, until April 27, 1903, ten months after said judgment had been rendered, affirmed, and fully paid and discharged. On April 27,

1903, the said William A. Hunter was found living under an assumed name in the state of Alabama, by one R. C. Milliken, who had for years been employed by the plaintiff in searching for him or for evidence that he had not died as alleged. Immediately after the disappearance of said William A. Hunter was announced in December, 1896, the plaintiff, believing that he had not been drowned as alleged, instituted a search for him or for proof that he was still living. Said search was thereafter continuously and diligently prosecuted by it during the entire time of the pendency of said litigation, at an expense of thousands of dollars, and by the use of all the resources at its command. But said search was constantly thwarted and rendered unavailing by the cunning deceits and concealments of said William A. Hunter, which he continually practiced in his own interest and that of his said sister, the defendant, Jennie M. Smythe, throughout the whole period of the pendency of said litigation and even after its termination. All of said deceits and concealments made in her behalf were adopted and ratified by said defendant, Jennie M. Smythe, and, as the plaintiff verily believes, were supported and aided also by her own acts of wilful deceit, concealment, and perjury, all as hereinbefore set out. And so the plaintiff was prevented from having a fair trial of said action at law, and was prevented from procuring the evidence required to establish its defense in said action, that is to say, to establish the simple fact that said William A. Hunter was not dead.

7½.

1. Sometimes the defendants William H. Clark, Morris A. Spoonts, Charles A. Culberson, and Phillips Investment Company allege and pretend that each of them acquired his several interest in the judgment and the fund described in section 5 of this bill, for a valuable consideration by him then paid, in good

faith, and without notice of the fact that William A. Hunter did not die on or about December 4, 1896, as averred by the plaintiff in the aforesaid action of Jennie M. Mettler v. The Fidelity Mutual Life Association of Philadelphia. And they pretend that therefore they should not be called upon to return to the plaintiff its moneys severally received by them as set forth in section 6 of this bill. But your orator charges the truth to be as follows.

2. On to-wit October 27, 1897, before the institution of her said action, Jennie M. Mettler, by a written contract of that date, employed William M. Alexander, William H. Clark, and William L. Hall, attorneys at law doing business as co-partners under the firm name of Alexander, Clark and Hall, to institute and prosecute suit against The Fidelity Mutual Life Association of Philadelphia upon its three policies of insurance described in section 3 of this bill. By said written contract also, in consideration of the legal services rendered and to be rendered by them, she transferred and conveyed to said Alexander, Clark and Hall an undivided one-third interest in said three policies. Thereupon they instituted and prosecuted the said action for the common benefit of Jennie M. Mettler and themselves. Thereafter, on to-wit May 29, 1902, by written transfer endorsed thereon, William M. Alexander and William L. Hall assigned and transferred to William H. Clark all their right and interest in said contract. The plaintiff has reason to believe, and does believe and so alleges, that when said contract was made on October 27, 1897, William H. Clark knew that The Fidelity Mutual Life Association of Philadelphia denied that William A. Hunter was dead; and that he then knew that the principal work which he and his co-partners were undertaking by said contract was the effort to obtain an adjudication that said William A. Hunter was in fact dead; and that so he took the transfer contained in said con-

tract with actual notice of this plaintiff's rights and defenses. Thereafter, on to-wit June 10, 1899, the firm of Alexander, Clark and Hall having been dissolved, and the firm of Alexander, Clark and Thompson having been formed by William M. Alexander, William H. Clark, and William Thompson, the contract described in the first paragraph of section 6 of this bill was made by Jennie M. Mettler with Alexander, Clark and Thompson and William L. Hall, as a substitute for the aforesaid contract of October 27, 1897. When such new contract was made, said action had been pending for more than a year; and by its pleadings therein filed this plaintiff had denied that William A. Hunter had died as alleged, and so had given notice of its rights and defenses to all persons dealing with said action or the matters therein litigated. When said new contract was made, all the parties thereto had actual knowledge of the denial so made by this plaintiff. The sum of eight thousand three hundred forty-six dollars received by William H. Clark as set forth in section 6 of this bill was received by him solely by reason of and in pursuance of said two contracts, and especially of said contract of June 10, 1899. Said sum was paid to William H. Clark by the clerk of the court by means of his check No. 427 for eight thousand three hundred forty-six dollars, drawn June 3, 1902, on The American National Bank of Dallas with instructions to pay the same out of the fund deposited in said cause of Jennie M. Mettler v. The Fidelity Mutual Life Association of Philadelphia.

3. The sum of fifteen hundred dollars received by Morris A. Spoonts as set forth in section 6 of this bill was paid to said Spoonts by the clerk of the court by means of his check No. 425 for fifteen hundred dollars, drawn June 3, 1902, on The American National Bank of Dallas with instructions to pay the same out of the fund deposited in said cause of Jennie M. Mettler v. The Fidelity Mutual Life Associa-

tion of Philadelphia. Said Spoonts endorsed said check in blank and transferred the same to The Fort Worth National Bank of Fort Worth, Texas; to which bank it was paid June 6, 1902, by The American National Bank of Dallas by crediting its amount to the account current of said The Fort Worth National Bank. Such payment was made to said Spoonts by order of William H. Clark, and out of Clark's share of said judgment. Said order was given by said Clark, and was accepted and acted upon by said Spoonts and the clerk of the court, as an assignment of an interest of fifteen hundred dollars in the judgment and the fund deposited in court by this plaintiff wherewith to discharge the judgment. When said order was given and accepted, said Spoonts had been for a long time acting as attorney for Jennie M. Mettler in her suit against this plaintiff; and he had actual knowledge of its denial by its pleadings filed in said cause of the alleged death of William A. Hunter, and so had actual notice of this plaintiff's rights and defenses. He did not part with any new and valuable consideration in exchange for said assignment or said check, but accepted the same in satisfaction of an antecedent debt, to-wit of his fees for professional services theretofore rendered in said cause.

4. The sum of one thousand twenty-six dollars received by Charles A. Culberson as set forth in section 6 of this bill was paid to said Culberson by the clerk of the court by means of his check No. 426 for one thousand twenty-six dollars, drawn June 3, 1902, on The American National Bank of Dallas with instructions to pay the same out of the fund deposited in said cause of Jennie M. Mettler v. The Fidelity Mutual Life Association of Philadelphia. Said Culberson transferred said check by endorsement to The National Exchange Bank of Dallas; to which bank the same was paid June 12, 1902, through the Dallas

clearing house, by The American National Bank of Dallas. Such payment was made to said Culberson by order of William H. Clark, and, as this plaintiff upon good grounds verily believes and alleges, partly out of his own share and partly out of the share of his co-defendant, Jennie M. Smythe, in said judgment and fund. The plaintiff is informed, and it believes and so alleges, that such order was given chiefly in pursuance of a certain written assignment, which was executed under date of December 30, 1901, by the defendants Jennie M. Smythe and William H. Clark, whereby they assigned and transferred to the defendant Charles A. Culberson an interest of one thousand dollars in and to said judgment, and also the cause of action, that is, the policies of life insurance sued upon, as a contingent fee to the said Culberson for professional services to be rendered by him in their behalf in defending said judgment upon a writ of error in the Supreme Court of the United States. The plaintiff is informed, and it believes and so alleges, that the remaining twenty-six dollars of the sum so ordered to be paid to him out of said fund, was to reimburse him for a like amount theretofore expended by him in the printing of a brief for the defendant in error in said cause pending in the Supreme Court. The plaintiff upon good grounds believes, and it so alleges, that when said order was given and accepted, and when said written assignment was given and accepted, said Culberson had made a careful examination of the record in said cause pending in the Supreme Court and knew its contents; and that he knew that by its pleadings therein contained this plaintiff had denied that William A. Hunter was dead as alleged; and that he knew that one of the errors assigned by this plaintiff in the Supreme Court was the refusal of the trial judge to charge the jury peremptorily in its favor, upon the ground that there was no evidence that said Hunter

was dead, and that the evidence established the fact that he was not dead. And so when he accepted said assignment and order and check, said Culberson had actual notice of this plaintiff's rights and defenses.

5. The sum of fifteen hundred forty and 25/100 dollars received by Phillips Investment Company as set forth in section 6 of this bill was paid to it by the clerk of the court by means of his check No. 424 for fifteen hundred forty and 25/100 dollars, drawn June 3, 1902, on The American National Bank of Dallas with instructions to pay the same out of the fund deposited in said cause of Jennie M. Mettler v. The Fidelity Mutual Life Association of Philadelphia. Phillips Investment Company endorsed said check and transferred it to the Bank of Montreal, which endorsed the same and transferred it to The Fourth Street National Bank of Philadelphia, which in turn endorsed the same and transferred it to The City National Bank of Dallas; and to said bank it was paid June 16, 1902, through the Dallas clearing house, by The American National Bank of Dallas. Said payment was made to Phillips Investment Company by reason of and in pursuance of the assignment described in the fourth paragraph of section 6 of this bill. By said assignment, under date of October 29, 1901, William H. Clark assigned and transferred to Phillips Investment Company all his interest in the cause of action and judgment in said cause of Jennie M. Mettler against this plaintiff, describing the same as follows: 'All of my right, title and interest, that is my contingent attorney's fees of about $8000.00, in the cause of action and judgment of $21550.00, rendered thereon on the 4th day of July, A. D. 1900, in the United States Circuit Court for the Northern District of Texas, at Dallas, in the life insurance case of Jennie M. Mettler v. Fidelity Mutual Life Association of Philadelphia, numbered 2118; said judgment rendered as aforesaid in favor of Mrs.

Jennie M. Mettler, and against said Association, from which judgment a writ of error is now pending in the Supreme Court of the United States.' Said assignment was given as collateral security for a certain promissory note, dated October 29, 1901, whereby said William H. Clark promised to pay said Phillips Investment Company, on or before March 1, 1902, the principal sum of fourteen hundred seventy-one and 57/100 dollars, together with interest thereon at the rate of eight per centum per annum from date, such interest to be paid semi-annually and each installment thereof to bear interest at the rate of ten per cent. per annum from its maturity. Said note was given for a preexisting indebtedness. Said assignment was filed with the clerk of the court December 2, 1901. When said assignment was given and accepted, and when it was filed in the Circuit Court, said cause was pending in the Supreme Court, to which this plaintiff had removed it by a writ of error filed September 1, 1900. At said time also the judgment in said cause had been suspended by a supersedeas bond filed by this plaintiff September 1, 1900. In accepting said assignment of such cause of action and such suspended judgment, Phillips Investment Company was bound to take notice of the rights and defenses of this plaintiff as disclosed by the record in said cause. Moreover, this plaintiff has reason to believe, and does believe, and so alleges, that in accepting said assignment Phillips Investment Company was acting under the advice of its attorneys,the aforesaid William M. Alexander and William Thompson, then doing business as copartners under the firm name of Alexander & Thompson. Said Alexander & Thompson, when they advised Phillips Investment Company to take such assignment, had actual knowledge as aforesaid that this plaintiff by its pleadings filed in said cause denied that William A. Hunter had died as alleged. This plaintiff further has reason to

believe, and does believe, and so alleges, that aside from the knowledge of its said attorneys, Phillips Investment Company had actual knowledge when it accepted said assignment of the fact that the principal issue involved in said litigation was that of the alleged death of William A. Hunter, and that this plaintiff denied that he had died as alleged. Sometimes, however, Phillips Investment Company pretends that it can disregard said assignment, and rest its rights upon the check given it by the clerk of the court as aforesaid, and upon its surrender of said note in exchange therefor. As to this the plaintiff avers the truth to be, that said check was given solely because of and in pursuance of said assignment. And further it avers that in accepting such check and surrendering such note, Phillips Investment Company was represented by and acted only through, its said attorneys, Alexander & Thompson; and that they then and there had full knowledge of the main issue involved in said litigation, and knew that this plaintiff had always denied that William A. Hunter had died as alleged, and had always availed itself of every legal method of enforcing such denial. This plaintiff further avers the truth to be that Phillips Investment Company parted with no new and valuable consideration in exchange for said check, but accepted the same in discharge of antecedent indebtedness.

8.

To the end, therefore, that your orator may have that relief which it can obtain only in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator, it now prays the court:—

1. That each and all of the said defendants, Jennie M. Smythe, James N. Smythe, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and

Phillips Investment Company, be restrained by the injunction of this honorable court from in any way making use of the aforesaid judgment, and especially from ever setting up said judgment by answer, plea, or demurrer as an adjudication that said William A. Hunter died in December, 1896, or as an adjudication that the plaintiff ever was indebted to them or any of them upon account of said three policies of insurance, or as tending in any way to justify them or any of them in receiving and converting to their own use the plaintiff's money paid to them severally as hereinbefore set out.

2. That each of said defendants, Jennie M. Smythe, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, be decreed to repay to the plaintiff the sum of its money received by him as aforesaid, with legal interest thereon.

3. That your orator may have such further or other relief in the premises, as the nature of the circumstances of the case may require.

9.

May it please your Honors to grant to your orator a writ of subpœna, to be directed to the said defendants, Jennie M. Smythe, James N. Smythe, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, thereby commanding them and each of them at a certain time, and under a certain penalty therein to be limited, personally to appear before this honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises, and to stand, perform, and abide by such order, direction, and decree as may be made against them in the premises, as shall seem meet and agreeable to equity.

And your orator will ever pray.

MAURICE E. LOCKE,
Solicitor and Counsel for Plaintiff."

Attached to the bill as exhibit A was a copy of the pleadings in the case of Jennie M. Mettler v. The Fidelity Mutual Life Association of Philadelphia. The most important issue raised by these pleadings, and the only one relevant to the present litigation, was that of the death of the insured. It was made by the defendant's plea of general denial(Tr., 17-18) to the plaintiff's allegations contained in the following words of her First Amended Original Petition: "That the said William A. Hunter died on or about the 4th day of December, 1896" (Tr., 11); and "Plaintiff avers that the said William A. Hunter met his death, as aforesaid, on or about the 4th day of December, 1896, in the waters and quicksands of the Pecos River, being drowned near what is known as the 'Texas Bend' in said river, while camping with a two-horse wagon on his way from Pecos, in Reeves County, Texas, to Mentone, in Loving County, Texas, his drowning not being discovered until December 27th, 1896, and his body never being recovered" (Tr., 12). The bill and amendments are to be found on pages 1-21, 30-34, and 73-76 of the transcript.

3.

PLEADINGS OF THE DEFENDANTS.

The defendants, Jennie M. Smythe and James N. Smythe, her husband, filed first a plea of privilege to be sued in Ohio (Tr., 27-28). This plea having been overruled (Tr., 28-29), they demurred (Tr., 35-38). Their demurrers in turn were overruled (Tr., 43), and they filed an answer, and, later, a supplemental answer, the substance of which was a denial of the charge of fraud preferred against Mrs. Smythe in the plaintiff's bill(Tr., 44-46 and 80-88). As they are not parties to this appeal, their pleadings require no further consideration.

All the defendants other than the Smythes joined in a demurrer (Tr., 25-26) and an amended de-

murrer (Tr., 40-42), and Phillips Investment Company filed a separate demurrer in addition (Tr., 38-40). Perhaps the objections to the bill presented, or intended to be presented, by these demurrers may fairly be stated as follows: (1) The provisions of the Seventh Amendment to the Constitution of the United States deprive the court of jurisdiction to entertain the suit. (2) The bill is wanting in equity. (3) No fraud is charged against any of the defendants other than Mrs. Smythe. (4) The bill is multifarious and misjoins parties defendant. (5)The fraud charged against Mrs. Smythe was the material issue in the action at law on the insurance policies. (6) The issue of the death of William A. Hunter was adjudicated and finally determined in the action at law. (7) The demurrants acquired in good faith, without notice of fraud, and for value, the fund sought to be recovered. (8) The bill does not propose to restore the demurrants to their former positions. The demurrers were overruled (Tr., 43-44); and each of the defendants filed an answer (Tr., 47-73), setting forth in detail the particulars of his acquisition of his interest in the fund, showing his personal good faith, and pleading the judgment as a final adjudication of the matters in controversy. Senator Culberson also pleaded in express terms the provisions of the Seventh Amendment (Tr., 72).

4.

DECISION OF THE CIRCUIT COURT.

The decree of the court granted to the plaintiff the relief sought against Mrs. Smythe and her husband, and denied that sought against the other defendants (Tr., 88-89). The learned district judge trying the case did not render a written opinion which might accompany the record. But perhaps we may be permitted to say, dehors the record, that he made

a brief and informal statement of his conclusions, in substance as follows:-

"I find from the evidence submitted in this case that the assured, William A. Hunter, is not dead, but living; and further, that the defendant, Jennie M. Smythe, and her brother, William A. Hunter, the assured, conspired together from the beginning, and concocted together the scheme to defraud the insurance company; that the inability of the insurance company to show on the trial of the case at law that Hunter had not met his death by drowning was due solely to the actions of himself and his sister, Mrs. Smythe; that they simulated a condition of facts tending to show that he was dead; and that they concealed the fact that he was living, studiously, carefully and persistently. I also find that diligence was used by the insurance company in attempting to ascertain and prove the fact that Hunter was living, on the trial of the insurance case, and that it was prevented from so doing by reason of the fraudulent conspiracy and acts of Jennie M. Smythe and her brother, the assured. I am of the opinion that the facts of this case bring it within the rule laid down by Chief Justice Marshall in the case of Marine Insurance Company v. Hodgson, 7 Cranch 332, cited and relied upon by the counsel for the complainant. The fact that Hunter was alive, was one of which the insurance company might have availed itself in the action at law, but it was prevented from so doing by the fraud of the defendant, Jennie M. Smythe, and her brother, the assured. There was no negligence on the part of the insurance company or its agents, which would preclude an appeal to a court of chancery. A great fraud was practiced upon the court, and an unconscientious advantage taken of the company without any fault or negligence on its part: New York Life Insurance Company v. Bangs, 103 U. S. 780. Clearly the relief sought by the complainant in its bill against Jennie M. Smythe and her husband, James N. Smythe, should be granted.

As to the defendants other than the Smythes, it is admitted by the complainant that each of them was without knowledge and innocent of the fraud which was being perpetrated on the insurance compa-

ny in the suit at law. The defendants William H. Clark, Charles A. Culberson, and Morris A. Spoonts, were attorneys retained by the plaintiff, Jennie M. Mettler, at various stages in the suit at law, to represent her before the courts in the prosecution of her claim against the insurance company. They, and each of them, performed legal services for her in the prosecution of her alleged claim, and in contemplation and consideration of such services received a substantial part of the proceeds of the judgment in the case at law after it was paid into the registry of the court. The bill of complaint and evidence in the record disclose with particularity the manner in which each of the attorneys who are made defendants came into possession of his portion of the fund paid into court. The various assignments, legal and equitable, are set forth and proved in order to show the interest and part of each under the judgment acquired, and also to show to what extent each participated in the fund. After consideration I have reached the conclusion that the rule enunciated and relied upon by the counsel for the complainant, with relation to the assignment of judgments, to the effect that an assignee of a judgment takes it subject to all equities existing between the litigants, whether he had notice of the same or not, has no application under the facts of this case. Here the judgment was fully satisfied by payment. The complainant seeks to follow the proceeds of the judgment into the hands of parties who received it innocently and in payment for services rendered. The record discloses that the money was innocently received by the attorneys and innocently expended by them; and I cannot find any principle, either of law or of equity, which, under the circumstances, will compel restitution from them. It is true they were put on notice of the complainant's claim in the suit at law that Hunter was not dead, but living; but in the absence of corrupt knowledge on their part that he was living, they had a right to rely upon the solemn and deliberate judgment of the court that he was dead, and so far as they are concerned that judgment so entered concludes the insurance company.

The defendant, the Phillips Investment Company, is in quite as favorable an attitude as any of the defendant attorneys. It innocently received an as-

signment of a portion of the judgment from the defendant Clark as collateral security for a debt owing to it by him; and it participated in the fund paid into court in satisfaction of the judgment, and surrendered its evidence of indebtedness against Clark in consideration thereof. It is quite blameless in the premises, and as stated with relation to the attorneys who are defendants, I know of no rule, either of law or of equity, which would compel the Phillips Investment Company to return what it has received under this judgment.

The view expressed here with relation to the attitude of the defendants other than the Smythes, should have led to the sustaining of the demurrers interposed and insisted upon by them. It now leads to the dismissal of the bill against them with their costs, and the decree will so provide."

SPECIFICATION OF ERRORS.

1.

The court erred in decreeing that the plaintiff take nothing by its suit against the defendant William H. Clark, and dismissing its bill of complaint as to said defendant.

2.

The court erred in decreeing that the plaintiff take nothing by its suit against the defendant Morris A. Spoonts, and dismissing its bill of complaint as to said defendant.

3.

The court erred in decreeing that the plaintiff take nothing by its suit against the defendant Charles A. Culberson, and dismissing its bill of complaint as to said defendant.

4.

The court erred in decreeing that the plaintiff take nothing by its suit against the defendant Phillips

Investment Company, and dismissing its bill of complaint as to said defendant.

5.

The court erred in not granting to the plaintiff the relief prayed for in its bill of complaint as against each of the defendants, William H. Clark, Morris A. Spoonts, Charles A. Culberson, and Phillips Investment Company (Tr., 500-501).

THE PROOF OF FRAUD.

The evidence taken for the purpose of establishing the existence of a conspiracy between Mrs. Smythe and her brother to defraud the insurance company is very voluminous. Probably we can be of most assistance to the court in reaching a clear conception of the facts of the case by giving it a narrative of the transactions with some running comment on their peculiarities.

1.

Antecedent Conditions.

William A. Hunter and Jennie M. Mettler (Smythe) are brother and sister. They came to Texas about 1886 (Tr., 415) from Licking County, Ohio, where their father and several brothers and sisters still live. For a time Hunter was bookkeeper in a grocery at Alvarado, Texas (Tr. 217 and 220). Then he lived at Quanah, Texas, being first in partnership with his brother-in-law, S. L. Mettler, in a real estate business, and afterwards a deputy in the office of the district and county clerk (Tr., 180, 217 and 220). About 1893, at the time of the organization of Loving County, he went to Mentone in Loving County, where he became sheriff and tax collector and was engaged in an attempt to construct an irrigation plant (Tr., 95, 107, 375, and 150). His brother-in-law, Mettler, was county attorney of Loving County, and was engaged in the same irrigation scheme (Tr., 109).

Loving County is in western Texas, near the New Mexico line, on the east side of the Pecos River, and about twenty to fifty miles north of the Texas and Pacific Railway. It was attached to Reeves County for judicial purposes, and in 1894 had one resident poll tax payer (Tr., 107). It was organized in 1893 on a petition signed by about 175 persons, most of whom were Mexicans employed by the irrigation company (Tr., 107, 151 and 155). The irrigation project was abandoned about 1894 or 1895, the company becoming insolvent (Tr., 107-108 and 151). When this happened, the inhabitants of Loving County left, and the county was depopulated. In 1896 scarcely any one was living there, and then, or soon after, Mentone was in the midst of a ranch (Tr., 108, 151, and 147). No taxes were assessed and collected for the years 1895 and 1896, and in May, 1897, the county was disorganized by legislative act (General Laws of Texas of 1897, chapter 143).

Hunter appears to have been away for the most of 1895, and to have left there finally in March, 1896 (Tr., 96, 152, 375, and 217). Mettler died in March, 1896 (Tr., 415), and Mrs. Mettler (Smythe) went to Pecos City to live (Tr., 373). During the most of 1896, and perhaps of 1895, Hunter seems to have been at Dallas and Ft. Worth, and without remunerative employment. For several months in the summer of 1896 he was working in a photograph gallery for his board and expenses (Tr., 217, 171, and 172). During this time he had a small and inactive account at the City National Bank of Dallas (Tr., 187-189). So far as Mrs. Mettler knew, he had in October, 1896, no property, except his claim to a section of land in Loving County, the note of R. H. Paschal for a balance of $180, a note against the estate of S. L. Mettler for $556.80, a note against his brother, C. R. Hunter, for $240, about $1500 of Loving County script, and a claim of $70 or $80 against the state for collect-

ing taxes (Tr., 400 and 401). Probably all of this was considered worthless, though the Paschal note was afterwards collected by Mrs. Mettler (Tr., 153-154). While Mrs. Mettler was in Pecos in 1896 she was in straitened circumstances, living with different families, and sewing for them (Tr., 95, 119, 374 and 153). Her husband left her no property of any kind, and she supported herself from the time of his death to the time of trying her insurance case in 1900 (Tr., 417 and 374). Her brother, William A. Hunter, contributed nothing to her support (Tr., 376). In September, 1893, and January, 1894, Hunter bought two sections of Loving County land from the state of Texas under what was known as the forty year act, paying for each $32 in cash, and his note for $1248. But these sections were forfeited for non-payment of the interest, of 5 per cent., to August 1, 1895 (Tr., 396). One of these sections, No. 46, was the section referred to by Mrs. Mettler as constituting a part of his property in October, 1896. It was situated about two and one-half miles from the Pecos River, and had no improvements on it (Tr., 401 and 420). When the insurance was effected, Hunter was an unmarried man, thirty-three years old, and Mrs. Mettler (Smythe) was a widow, without children, and thirty-five years old (Tr., 393, 398, and 415).

2.

THE INSURANCE OBTAINED.

As early as January, 1896, two months before her husband's death, Mrs. Mettler and Hunter had talked of insuring his life (Tr., 400). About October 28, 1896, Hunter called at the office of Andrew J. Brown, in Dallas, state agent for the Fidelity Mutual Life Association. Brown had known him at Alvarado, and met him at Quanah, but had not seen him subsequently. After a general conversation and renewal of acquaintance, Hunter told Brown that he and

Mettler had gone from Quanah to Pecos City, and there had bought up a large body of Pecos Valley land and engaged in an irrigation scheme which had fallen through. He said Mettler had died and left a widowed sister on his hands, and that if he should die, his sister would lose what they had put into the land (Tr., 220). This was colorable, but false. The insurance scheme had been broached before Mettler's death (Tr., 400). Mettler had left no property of any kind to his wife (Tr., 417). Hunter never contributed a cent to her support after the death of her husband (Tr., 376). Hunter and Mettler had not bought a large body of Pecos Valley land; but Hunter had invested $64 in two sections, which had long since become subject to forfeiture for non-payment of interest (Tr., 396). Hunter told Brown that he lived at Pecos City, and that his occupation was real estate and farming (Tr., 221, 388, and 393). This was false. He did not live at Pecos City, and perhaps never had lived there (Tr., 375). He was not engaged in the business of real estate and farming, but was without employment or fixed place of residence. So far as known, he never had been engaged in farming, save that while at Mentone he devoted a tiny patch of arid land to experimental truck raising, watering it with buckets (Tr., 420). He applied for $15,000 of insurance in favor of his sister, selecting a very cheap form of policy, and stating that he would furnish the money to keep it in force (Tr., 394). He paid the premium for six months, $97.65, by giving his check on the City National Bank for more than one third of the amount of his balance there Tr., 221 and 189). He stayed around Dallas until November 7th, when the policies applied for were delivered to him in person by Brown (Tr., 222). Then he went to the City National Bank and withdrew his entire balance of $163.30, thus closing the account which he had carried there for more than two years (Tr., 187 and 189). Af-

ter that he was seen no more in Dallas, until he was brought back by the sheriff in November, 1903 (Tr., 222); and he paid no subsequently accruing premiums on the insurance.

3.

HUNTER'S VISIT TO PECOS CITY.

About three weeks after getting his insurance policies in Dallas, Hunter appeared in Pecos City, some 435 miles west of Dallas, where he had not been before for eight months (Tr., 96). Mrs. Mettler had been in correspondence with him (Tr., 376); and evidently she knew in advance of this visit and of its pretended purpose, since she had made arrangements to get her own horse in from the country, and to borrow another (Tr., 147-148, 400, and 142). Here he spread the report that he was going up to Mentone to live out his period of occupancy on a section of land he had entered there (Tr., 96-97, and 151). This story is shown to have been false, not only by subsequent developments, but by the fact that the only land there to which he ever had had any claim had been for more than a year subject to forfeiture for non-payment of interest, a fact which he must have known (Tr., 396). Moreover, he had not lived for nearly three years, as he stated, on the land which he pretended to claim. He bought it in January, 1894 (Tr., 396), and appears to have left Mentone in 1895 (Tr., 217). Section 9, Chapter 99, of the Texas General Laws of 1887, under which this purchase seems to have been made, required the purchaser of land to reside upon it as a home for three consecutive years next succeeding the date of purchase; and it required the payment of one fortieth of the purchase price in cash, and of one fortieth together with 5 per cent. interest on the unpaid balance, on Augsut 1st of each year thereafter. Section 11 provided that if on August 1st of any year the interest should remain unpaid, the land should be

forfeited. By the same section failure to reside upon the land and improve it in good faith was made a ground of forfeiture. Hunter knew that he had not complied with any of these requirements, and that he had no valid claim upon the land. Hunter was at Pecos only afew days, and during that time he and Mrs. Mettler were much together. They went together to Oates's livery stable after Mrs. Mettler's horse (Tr., 148). They went together to Mrs. Manning's house in the country after the Powers horse on the 2nd day of December, stayed at the gate half an hour or an hour before going up to the house, and remained by themselves in an upper room there for two or three hours Tr., 141 and 143). On the morning of the 3rd, after Hunter's team had been hitched up, they were together again near her boarding house (Tr., 157). The long conferences at Mrs. Manning's house were of a most unusual character. On the 3rd of December, Hunter left ostensibly for a trip of ten days into a desert of sand and alkali; but the rations taken by him were inadequate for such a journey (Tr., 113 and 133). Ostensibly he went for the purpose of building a house to be occupied by Mrs. Mettler and himself (Tr., 163); but he took no building material (Tr., 134 and 115). Ostensibly he was going into a wilderness to engage for several days in manual labor; but he wore a nice black overcoat, a black suit, nice calf-skin shoes, a white laundered shirt, with collar, cuffs and necktie, and a blue gingham shirt over the white shirt (Tr., 400). Mrs. Mettler knew of this unsuitable attire, for the description of it comes from her. He left the insurance policies and some other papers in the bank at Pecos, of which he was not a customer (Tr., 150-152); but he did not deposit there any of the money he had withdrawn from the Dallas bank (Tr., 122), and he left in Mrs. Mettler's possession the note which afterwards formed her excuse for calling at the bank (Tr., 153, 371, and 377). This note was the subject of conversa-

tion between them while he was at Pecos (Tr., 401), a fact which she denies in her deposition given in the present suit (Tr., 377). Their discussion of his business affairs was so detailed as to include this old and supposedly worthless note for $180, and he left this note in her possession; yet she testified in her proofs of death, on the trial of the insurance case, and in this suit, that he told her nothing about the $15,000 of insurance in her favor, for which he had paid $97.65 less than a month before (Tr., 400, 418, and 362); and he left these policies, which were her property, in the bank.

4.

HUNTER'S DISAPPEARANCE.

On December 3, 1896, a little before noon (Tr.,114, 149, and 157), with a wagon containing some bedding, cooking utensils, and provisions for himself and team, and drawn by Mrs. Mettler's pony and the borrowed Powers horse, Hunter started professedly for Mentone. He went east on the Barstow road about one and one-half miles until he crossed the bridge over the Pecos River, and then turned north on the Mentone road. At a point about fifteen miles north of the bridge he turned off to the left towards the river, and at a distance of about 100 yards ran up against an impenetrable thicket in a slough. He turned north again, and followed up the edge of this thicket, about parallel with the road, for perhaps half a mile; then he turned to the left again and went through the thicket to the river, where in a little open glade on the bank he pitched his camp (Tr., 99-101). The spot was a lonely one, unfrequented, and invisible from the road, which ran 400 or 500 yards or more to the east of it, and from which it was separated by a dense growth of mesquite brush (Tr., 100, 106, 115, and 125). About three miles south of it was the Rock Crossing of the Pecos, which was a

regular camping place, and a mile or two north of it was another well known camping place on the river (Tr., 99, 114, 125, and 149). From Pecos City to the location of Hunter's camp, by the route he took, was about a half day's drive (Tr., 131 and 149), and it must have been near evening when he got there. When the camp was discovered only one kind of human footprints was found, those of a man wearing an 8½ or 9 shoe, long, slender, and neat looking(Tr., 104-105). On the trial of the insurance case, Mrs. Mettler testified that she recognized these as her brother's tracks (Tr., 416, and 421-422). Therefore whatever was done at the camp by human agency, must have been done by Hunter. When the camp was discovered on the 27th of December, the wagon was found at the edge of the glade, about 175 feet from the river. Near it was a complete set of harness for two horses. Beside it a bed had been made, and in the bed was an imprint as of a man who had slept in it over night (Tr., 101 and 416). A camp fire had been kindled, and a skillet on the ashes indicated that something had been cooked there. A rifle was leaning against the wagon. There were about two bales of alfalfa hay in and beside the wagon; and tied to a bush just out of reach of the hay was the body of Mrs. Mettler's pony, which had died of starvation after beating a half-moon track in the sand in its efforts to reach the hay. There were buckets in which water had been drawn. Leading from the wagon to the river and back at a point where water had been drawn, were Hunter's tracks. Diverging from this line of tracks was another line about 17½ feet long, leading to a point just over the edge of the river bank, and there ending, with nothing to show how the man had gotten away from that spot. Just at this point was a broken shrub, and the last footprint bore signs of slipping. There was no indication as to what had become of the Powers horse (Tr., 101-

104, 105, 122-125, and 132-133). The town of Barstow is located on the Texas and Pacific Railway, seven miles east of Pecos City, and about five miles east of the bridge on which Hunter crossed the Pecos River. There was one passenger train each way daily in December, 1896, the east bound train passing through at about midnight (Tr., 101 and 166). On the morning of December 4th, the next morning after Hunter left Pecos City, the Powers horse was seen near the railway station in Barstow. Tied to its neck was a rope nine or ten feet long, knotted at the loose end. The rope did not appear to have been dragged any considerable distance. The horse stayed there three or four days until Capt. Irvin led him out of town and bled him, and there he died soon afterward (Tr., 166-170, and 126). The Powers horse was a good camp horse, not likely to stray. He had formerly been kept in a pasture just across the river from Hunter's camp, and never had lived at Barstow (Tr., 158-159). There were no indications of his having been tied at the camp, and broken loose (Tr., 105 and 125). An old coat of little value, having in one of its pockets a letter addressed to W. A. Hunter, was found at the camp (Tr., 108, 116 and 122). Hunter's overcoat and valise were not found (Tr., 108 and 123). Mrs. Miller, a disinterested witness, testified that he took his overcoat and valise with him when he started (Tr., 174). On the trial of the insurance case Mrs. Mettler testified that when Hunter started he left his valise and extra wearing apparel with her; and she explained her inability to produce them by saying that she had sold them to a dealer in second-hand goods (Tr., 421). In her deposition in the present suit she denied having sold anything belonging to Hunter (Tr., 376-377). A few weeks later, on January 1, 1897, in Nashville, Tennessee, Hunter made a contract with a nursery company to travel for it through the country districts selling nursery stock at

$40 per month and expenses. He made the contract as W. A. Hunt, of Nashville (Tr., 251-255, 402-404, and 257-260). When he arrived at Nashville is not disclosed by the evidence.

5.

EVENTS AT PECOS CITY.

Hunter left Pecos City on the 3rd of December, to be gone about ten days. Promptly at the expiration of this period, Mrs. Mettler became very uneasy about him, and asked Mrs. Johnson to get her husband to have a search made (Tr.,163, 120 and 415). About the 18th he sent a young man to Mentone to look for Hunter, and a few days later he sent another (Tr., 120-121, and 416). Before the discovery of Hunter's camp she wrote to the family in Ohio about his disappearance (Tr., 290). This nervousness does not harmonize with the coolness and self-possession she displayed on other and more trying occasions (Tr., 134, 163, and 234). Hunter's camp was found by Mr. Gibson on the 27th of December, and on the 29th, Mrs. Mettler visited its site (Tr., 105). Within four days thereafter, she had gone to Mr. Gage, a lawyer and banker, and custodian of Hunter's insurance policies, for advice as to how she should proceed to collect the balance due on Paschal's note to Hunter, and so had made an accidental discovery of the policies (Tr., 153, 362, and 397), which he then produced from his vault. She pretended to Gage, and testified on the trial of the insurance case, that she knew nothing of the existence of the insurance policies until she thus learned of them by chance (Tr., 154, 156, 418-419, and 362). Yet long before this, and before Hunter's visit to Pecos City, she had told Mrs. Johnson of Hunter's having insured his life in her favor (Tr., 162 and 164). This, however, she denies in a negative pregnant sort of way (Tr., 369). On January 2nd, Mrs. Mettler mailed to the insurance

company a registered letter, asking for blanks upon which to make proofs of her brother's death, and of her claim under the three policies, mentioning their numbers (Tr., 397 and 138). Yet on the next day she told Mrs. Johnson that she did not know in what company her brother's life was insured, or where the policies were (Tr., 162-163, and 126-127). The matter of insuring Hunter's life had been talked of between them as early as January, 1896 (Tr., 400 and 154), and during his visit to Pecos they had conferred long and closely. It is impossible to believe that she obtained her first knowledge of the policies from Gage; and if she did not, the elaborately contrived scheme of accidental discovery is almost conclusive evidence of her complicity in the fraud.

Upon receipt of Mrs. Mettler's notice of Hunter's death, the insurance company instructed R. C. Milliken to go to Pecos City and investigate (Tr., 231). Becoming convinced that the case was one of fraudulent disappearance, he conceived the idea of testing Mrs. Mettler by a bogus telegram. He therefore arranged that a message should be sent him from El Paso at a certain hour, and should be delivered to him at Mrs. Mettler's boarding house. In pursuance of this arrangement, while talking with her there, the following telegram, dated El Paso, Texas, and regular in every particular, was delivered to him by the messenger:—"R. C. Milliken, Pecos, Texas. Have got your man. Will reach Pecos on to-night's train with him. Have sheriff meet us at train. J. J. Good." He paid for the telegram, read it, and handed it to Mrs. Mettler. She read it, kept her eyes fixed upon it for several minutes, and then said: "Thank God, my brother is still alive." Milliken told her to give him the policies, and she said she would when her brother came. Milliken testifies that she exhibited no alarm or surprise, but appeared just as before (Tr., 233-234). We have followed Milliken's account

of this transaction. Mrs. Mettler's account differs from his in detail, but not in the important circumstance that she entirely disbelieved his claim, and retained her self-possession (Tr., 363). The experiment had failed utterly, and Milliken had subjected himself to the charge, used with great effect all through the subsequent litigation, of trying to scare a poor widow into an admission of guilt by means of a false telegram. The test was indeed a harsh one, justified only, if at all, by Milliken's conviction that it was necessary to fight the devil with fire. It might well have been expected to shatter the nerves of even so cool and brainy a woman as Mrs. Mettler. Probably it would have done so but for one circumstance; —the telegram came from the west, from El Paso, while Hunter was then far in the east at Nashville, and she knew it. Her deposition does not contain an explicit denial that she knew he was alive and knew where he was. Milliken reported to the company that Hunter was not dead. The company refused to pay, and in due course of time Mrs. Mettler brought suit on the policies.

6.

HUNTER'S LIFE AFTER HIS DISAPPEARANCE.

Within less than a month after he left Pecos City, Hunter was at Nashville, Tennessee, claiming to be a resident of that city, and going under the assumed name of W. A. Hunt. Under that name, on January 1, 1897, he contracted with the Cumberland Nurseries to travel and sell nursery stock. He agreed to "stay in the country from Monday morning until Saturday night". For his services, he was to receive his expenses and $40 per month of twenty-six working days. This contract was renewed at $50 per month in 1898, Hunter in the meantime having changed his headquarters to Atlanta, Georgia (Tr., 251-255, 402-404, and 257-260). On January 22,

1897, D. G. Wallace, a book agent at Nashville, who formerly lived at Newark, Ohio, met Hunter in Nashville. Hunter gave him his true name and told him who he was, but told a false story about what he was doing, and then disappeared again (Tr., 306-309, 232, and 272-273). The season for the sale of nursery stock is short, and Hunter seems to have spent only a few weeks at it each year. He became a sewing machine agent, first at Atlanta, Georgia, and then at Brookside, a small mining town near Birmingham, Alabama, where he located in the latter part of 1898 (Tr., 262-263, and 258). He lived at Brookside as a sewing machine agent, under the name of W. A. Hunt, from that time until he was arrested in April, 1903 (Tr., 258 and 262). On April 27, 1903, he was arrested at the instance of R. C. Milliken, who describes the occurrence thus:

"I saw him on the 27th of April, 1903 (1902 in the record by mistake), sitting in a barber chair in a barber shop in Birmingham, Alabama. I waited at the door until he got his hair trimmed, and as he came up to the door I walked up to him and offered him my hand to shake hands with him and said: 'How are you, Will?' He had both hands full. He set down one of his bundles or grips, and shook hands with me. He didn't say anything for a minute. He said he didn't know me. I remarked: 'Don't you know Johnson, who used to live at Childress?' and then he said: 'Johnson, Johnson, Johnson,' and threw his head down. I told him I was Johnson, the former district attorney, and lived at Childress; and when I asked him again, he said he didn't know me. I then remarked to him, I said: 'Don't you remember when I was district attorney, and you were in the district clerk's office at Quanah?' I said: 'You were in the district clerk's office at Quanah?' and he said: 'Yes.' That is the only admission I could get out of him during my conversation with him as to his whereabouts. I asked him where he had been, and he said he had just been around everywhere, he didn't state anything definite. I asked him where he was living, and he

didn't answer that. I got no admission that his name was Hunter or Hunt or anything else. I didn't know him, I didn't know he was anywhere in the country until I saw him that time in the barber chair. I recognized him from the photographs that I had seen which purported to be his. He told me he had to go and catch his train, and I told him that the first train he could get was to go to Texas; and he asked me what for; and I told him for swindling that insurance company. Then he asked me to go around—just go around where we could have a private talk; and I took him in the back of the barber shop; and he asked me if we couldn't go up in a room and talk; and I told him that was private enough. We had a conversation there in the barber shop with some eight or ten white barbers; and in the meantime I had one of the barbers to telephone the sheriff's office to come down and apprehend an insurance swindler; and I held him there until two deputies from the sheriff's office came down; and then I swore out a warrant against him" (Tr., 234-235).

Under the name of W. A. Hunt, Hunter applied for a writ of habeas corpus, denied that he was the identical person who committed the crime charged against him, appealed to the Supreme Court of Alabama from the judgment of the lower court refusing the writ, and so lay in jail in Birmingham for about seven months while resisting extradition to Texas (Tr., 235, 405-413, 222, and 181). Immediately after his arrest, A. J. Brown and H. B. Taylor went from Dallas to Birmingham to identify him. On April 29th they saw and recognized him, and he recognized both of them (Tr., 181 and 222). The sheriff brought him to Dallas about November 25, 1903 (Tr., 222), at which time he was again identified by Brown and by John H. Stuart, whom he recognized (Tr., 218). Stuart was one of the persons named by him as references in his application for the insurance (Tr., 394). In April, 1904, he was tried for swindling the insurance company, and sentenced to confinement in the penitentiary for five years; but the Court of Criminal

Appeals reversed the judgment on the ground that the Texas statute against swindling was not broad enough to cover such a case (Hunter alias Hunt v. State, 81 S. W. 730, and Tr., 93). During the trial he was seen and recognized by numerous persons who had known him before his disappearance; and he recognized them in turn (Tr., 107, 120, and 152). Up to the time of Hunter's disappearance, he had maintained a regular and active correspondence with the home-folks in Ohio. Immediately upon his disappearance this correspondence ceased entirely and permanently (Tr., 289, 290, 296, 303 and 315).

7.

METTLER v. FIDELITY MUTUAL.

About December, 1897, Mrs. Mettler filed her suit against the insurance company in the state court at Dallas to recover on the three policies, and the company removed the case to the Circuit Court of the United States for the Northern District of Texas (Tr., 345-346), where it was tried at the May term of 1900. It resulted in a judgment in her favor for the face of the policies, $15,000, and $2,250 interest, and $1,800 damages, and $2,500 attorneys' fees (the last two items being the penalty assessed against the company under a Texas statute for its failure to pay her claim promptly), making in all, $21,550. The company sued out a writ of error to this court, where the judgment was affirmed May 5, 1902, the decision being reported at 185 U. S. 308. In her petition, Mrs. Mettler alleged that "William A. Hunter met his death on or about the 4th day of December, 1896, in the waters and quicksands of the Pecos River, being drowned near what is known as the 'Texas Bend' in said river, while camping with a two-horse wagon on his way from Pecos, in Reeves County, Texas, to Mentone, in Loving County, Texas, his drowning not being discovered until December 27, 1897, and his body never

being recovered" (Tr. 12). The Company pleaded a general derial (Tr., 17-18), and the issue thus presented was the main subject of litigation. To maintain her position, Mrs. Mettler proved by several witnesses, of whom she herself and J. B. Gibson were the most important, the manner in which, and the ostensible errand upon which, Hunter left Pecos City on December 3, 1896; the efforts made by herself to find him when he had overstayed his time; the discovery of his camp on December 27th; in full detail the appearance of the camp and its surroundings when found; the dangerous character of the Pecos River; Hunter's unwonted absence and silence, then covering a period of three and one-half years; her accidental discovery of the policies; and the family reputation that Hunter was drowned at the time and place alleged. The company proved many circumstances tending to show that Hunter did not drown as averred, and introduced the testimony of two witnesses who claimed to have seen him (Tr., 413-491, and 183-184). The evidence convinced the jury and the judge that Hunter did in fact drown as claimed by Mrs. Mettler; and this court held it to be sufficient. We alwayshave thought that the jury was not fairly subject to the criticism which has been heaped upon it for reaching the conclusion that it did. We cannot summarize the evidence in any way better than by quoting the resume given of it by Chief Justice Fuller in these words: "The question of Hunter's death was a question of fact to be determined on all relevant facts and circumstances disclosed by the evidence. The evidence tended to show that he was last seen alive on December 3d, when he parted from his sister and started for Mentone, with the intention of returning in a few days. He did not arrive nor return, but disappeared. He camped on the banks of the Pecos River, and the abandoned wagon, harness and gun, the starved horse, the ashes of the fire,

the used cooking utensils, the fragments of food, the bed with its imprint of the sleeper, bore testimony that he cooked, ate, and slept there, and that he went no farther. The footprints to the river's brink,going but not returning, the water buckets, the mark of slipping, the fractured root, the flowing stream,—indicated what might have happened; and the fact that he was not seen nor heard from thereafter, although his relations with his amily were intimate and cordial, and he had always kept up a correspondence with them, so that one or more of them would have been likely to hear from him unless his life had abruptly terminated, or its habitual course been suddenly changed, rendered the inference of fatal accident reasonable" (195 U. S. 316). The evidence was sufficient, and the witnesses in the main testified truly as to what they had seen. But what the witnesses saw was itself from center to circumference a mass of falsehood. Every evidential fact was manufactured; and manufactured for no other purpose than that it should be observed by some innocent witness and communicated first to the insurance company, and if it should not be deceived, then to the court. Even the family reputation that Hunter was drowned had for its sole basis the circumstances of his disappearance as detailed to the family by Mrs. Mettler, and the sudden and permanent cessation of his correspondence (Tr., 290, 296, 303-304, 315, and 319-320). This is a fraud of the most insidious kind, beside which perjury is the mere blundering of a fool.

8.

THE ATTITUDE OF THE HUNTER FAMILY.

This family is a large one, and most of its members still live in Licking County, Ohio. Hunter and Mrs. Mettler came to Texas about 1886, and thereafter maintained a regular correspondence with their father and brothers and sisters in Ohio. Hunter's

correspondence ceased with his disappearance in December, 1896, and never has been resumed. After Hunter had been gone some time, Mrs. Mettler wrote home of his disappearance and of his continued absence, and after the camp was found she described it (Tr., 290 and 303). In January, 1897, about six weeks after Hunter's disappearance, one Ab Landis of Philadelphia visited the family, told it of the insurance on Hunter's life, and obtained a description of him. This was the first the family knew about the insurance (Tr., 293, 300 and 316). On January 22, 1897, D. G. Wallace, a former resident of Licking County, saw Hunter in Nashville, Tenn. (Tr., 307-309). Having seen in the Newark Advocate, which was sent to him regularly, an item published January 8, 1897, giving an account of Hunter's supposed drowning, he wrote to that paper, stating that he had seen Hunter in Nashville (Tr.,309, 324 and 327). On January 29, 1897, the Advocate published an article based on Wallace's letter, stating that Hunter was alive (Tr., 323 and 327). A copy of the paper containing this article was mailed by the editor to a member of the Hunter family (Tr., 327). F. P. Housholder, a brother-in-law of Hunter, wrote to Wallace for information; and on February 2, 1897, Wallace replied stating the circumstances of the meeting, and giving a description of Hunter, which was accurate so far as it went (Tr., 283-285). Housholder communicated to the other members of the family the fact of his having received this letter (Tr., 284), and Mrs. Mettler also was informed of it (Tr., 298-299). Hunter's father testifies that when he received the copy of the Advocate, he wrote to Wallace but got no reply (Tr., 298). Wallace testifies that he did not receive the letter (Tr., 309). Housholder did not reply to Wallace's letter (Tr., 309 and 284); and so far as known no member of the family ever took any other steps to ascertain whether it was a fact that Hunter was

alive and in Nashville in January, 1897 (Tr., 286, 293 298, 302, 309, 316 and 321). They "took it for granted" that he was dead (Tr., 320), and continued very persistently so to do. Strangest of all, Mrs. Mettler, who was then engaged in prosecuting her claim against the insurance company, based upon the theory that Hunter was dead, received from the family in Ohio a newspaper clipping showing that Wallace had seen her brother in Nashville, and made no effort whatever to learn whether it was true that he was alive and in Nashville (Tr., 378-379). When Hunter's arrest was reported, a half uncle wrote to some one in Birmingham, and in reply got a description of the party arrested, but it was not considered a good description (Tr., 318, 321 and 332). Aside from this, so far as known, no member of the family made any effort to learn whether it was really the lost son and brother who was in jail in Birmingham (Tr., 332, 321 and 318). As to most members of the family this evidence did not even create a suspicion that Hunter was alive, and some of them do not know it yet (Tr., 286-287, 299 and 294). There was an extreme lack of curiosity on the part of this family. Knowing that Mrs. Mettler had collected many thousands of dollars from the insurance company on the theory that Hunter was dead, most of them had no conversation with her about his arrest or about the steps taken by her to learn whether he was alive; and except her father those who did talk with her cannot remember what was said (Tr., 286, 294-295, 297 and 305). This apathy was not due to any want of intellectual acuteness. It never has been our lot to examine witnesses sharper, cooler, or more alive to their own interests. There are two exceptions to the general rule. One witness, Luella M. Butcher, was found momentarily off her guard, and the following colloquy ensued: "Q. When did you first suspect that your brother, William A. Hunter, was still living after his disappearance? A. I did not

believe that he was living until it was proven. Q. My question was, when you first suspected it, not when you first believed it. A. I don't know. Q. Did you have such a suspicion at any time before his arrest? A. Not until along towards the last did I think of such a thing. Q. About when was it that you first thought of it, — about how long before his arrest? A. I didn't suspicion it, but a doubt sometimes from what people would say, would sometimes, a little bit, come into my mind, but I did not suspicion it, really. Q. What was it that first caused these doubts to come into your mind, what fact or statement? A. Newspaper reports. Q. Reports in what newspapers? A. The first was in the Mt. Vernon Banner, copied from the Newark Advocate, I think. Q. What did that say that caused you to have doubts? A. I don't remember" (Tr., 291). The other exception was that Dr. F. J. Hunter, a brother, who did not share in the general family belief that Hunter was dead, and whose deposition was not taken by Mrs. Mettler in the insurance case (Tr., 331). In a letter written by him to J. B. Gibson December 20, 1902, more than four months before Hunter's arrest, he said: "I never believed him dead until a year or so ago; then I knew something was crooked somewhere; and I know now where." Asked to explain what he meant by this, he said it referred to Mrs. Mettler's appropriation of Hunter's property (Tr., 331-332).

9.

MRS. SMYTHE'S (METTLER'S) CONDUCT.

After Hunter's disappearance Mrs. Mettler lived for a time at Pecos City, then at Dallas (Tr., 228), and after a year or two she returned to Licking County, Ohio. There she lived as a member of her father's family until she married James N. Smythe about the last of March, 1903 (Tr., 297-298, 302 and 317).

When Wallace wrote to Housholder in February, 1897, that he had seen Hunter in Nashville, the fact that such a letter had been received was communicated to her, and a clipping from the newspaper was sent to her (Tr., 298-299 and 378-379); but she took no steps whatever to ascertain whether it was true that Hunter was alive and in Nashville (Tr., 379). While she was living in Dallas she received her mail through the general delivery at the post office, and she instructed the clerk in charge not to let any person except one certain woman have her mail even on a written order (Tr., 228). When Hunter disappeared Mrs. Mettler took possession of his papers that were left in the bank, and also of his note against Paschal, which she collected. She never said anything to the other members of the family about settling his estate, and giving to them their share of the property (Tr., 292, 297, 304, 315, 320 and 330). In fact she had very little to say at home about Hunter and his affairs (Tr., 332). When this court had affirmed her judgment, she wrote to William H. Clark, her attorney, congratulating him, and telling him what to do with her money. In that letter she said: "Wonder how old Millican feels—you know my contempt for the man, so you can judge how I rejoice over his defeat. Wouldn't he look sour now. *If there was or is anything more he can do, he will do it*" (Tr., 199). Mrs. Mettler was altogether too shrewd a woman not to know that the battle was over, and that there was nothing more that Milliken could do, *unless there were some fraud yet undiscovered which his continued vigilance might unearth.* To us this passage of her letter seems significant. On June 23, 1903, Clark sent her $11,160.50 as her part of the proceeds of her judgment against the insurance company (Tr., 350). On July 2nd, she deposited this money in the bank of A. J. Wilson, at Utica, Ohio. Later on, she made another deposit of $145.67 there. On various dates prior to

April, 1903, she had drawn against this fund thirteen checks, aggregating $4172, leaving in the bank a balance of $7134.17 (Tr., 275-279). Hunter was arrested April 27, 1903 (Tr., 234), and identified April 29th by Brown and Taylor (Tr., 181, 222 and 273). So far as known, Mrs. Mettler took no steps to ascertain whether the man arrested was really her brother (Tr., 305, 318, 321 and 332). She told her father that she did not believe he was (Tr., 297), and in her answer filed in this suit March 7, 1904, she said the same thing (Tr., 46). At the time of Hunter's arrest, Mrs. Mettler was living in Newark, Ohio (Tr., 299), and keeping her money at Wilson's bank in Utica. On April 29th, she was at Homer, which is four miles from Utica, and somewhere near fifteen miles from Newark. On the afternoon of April 29th, there was published in the Newark Evening Tribune an article announcing the arrest of Hunter, and giving some account of the matter (Tr., 367-369). This paper must have been sent to Mrs. Mettler from Newark to Homer that evening, as she testifies that from it she received her first information of Hunter's arrest (Tr., 367), and on the morning of the next day, the 30th, she went in a buggy from Homer to Utica, and there withdrew from Wilson's bank, in cash, her entire balance of $7134.17 (Tr., 381 and 276). This she did because of what she had seen in the paper (Tr., 383). If she was an honest woman with a clear conscience, why should she do such a thing as this? When Hunter disappeared, she was very prompt to conclude that he was dead. When Wallace reported having seen him in Nashville, and she was engaged in trying to convince the insurance company that he was dead, she did not see any reason for doubting that he had been drowned, and did not consider it worth while even to investigate the report. When Milliken showed her a telegram, stating that Hunter had been arrested in El Paso, when in fact he was fifteen hundred miles from there, in Nash-

ville. her equanimity was not disturbed. and she continued steadfastly to assert that he had perished in the waters and quicksands of the Pecos River. All of these things happened within a few weeks after his disappearance. But when he had been gone for more than six years, and when the courts had approved her claim that he was drowned, and when the insurance company had been compelled to pay out more than $24,000 on that theory, a newspaper report came that he was alive and had been arrested in Birmingham, Alabama. Forthwith, and without waiting to investigate, she acted on the assumption that he was alive, that he had been arrested, and that trouble for her was coming. This was a strange reversal of her attitude. But it is explainable. Hunter had been living for years in or near Birmingham under the name of W. A. Hunt. If she knew it, she was prepared to believe a report coming from that place of the apprehension of William A. Hunter, alias William A. Hunt, charged with swindling the insurance company in this matter. Nowhere in her deposition is there an express denial that she knew all the time that he was alive, and where he was. Nearly a year before, she had written to Clark that if there was anything more that Milliken could do he would do it. Did she realize then that Hunter was alive, and that if the fraud were discovered, there would be new rights which the company could enforce? Was this in her mind all the time from the date of that letter to the date of Hunter's arrest? Was it this knowledge, and a previous study of the probable course of events if Hunter were found, that made her ready to act instantly upon receipt of the tidings of his arrest? Certainly it does appear so. On April 30, 1903, Mrs Mettler, then become Mrs. Smythe, withdrew from Wilson's bank, in cash, the sum of $7134.17 (Tr., 276). A day or two after that she was questioned very particularly by the tax assessor, her attention being called especially

to the money she was supposed to have received from the insurance company. She swore that she had no moneys or other personal property (Tr., 312 and 326). This however she denies in part (Tr., 384-385). Of course it may be that she was swearing falsely for the purpose of evading taxation. If so, the fact is not calculated to lend credit to any statement made by her at any time, whether made by word or by act. It may be, however, that she considered herself as simply a trustee for Hunter, that to avoid suspicion she had become his banker for a time until there should be opportunity to turn the money over to him without the appearance of evil. What became of this large sum of money is not shown by the evidence. In her deposition she repeatedly refused to tell, *and finally based her refusal upon the ground that her answers might tend to incriminate her* (Tr., 381-386). The bill charges upon information and belief that Mrs. Mettler paid over to Hunter a large portion of the money received by her. The case was put at issue as to all the defendants on July 4, 1904. The time within which testimony might be taken expired October 4, 1904. Mrs. Smythe's deposition was not taken until January 23, 1905, and was filed by special agreement January 30, 1905, the date on which the case was set for trial (Tr., 387). Hunter's deposition was not taken at all; though Mrs. Smythe was represented in this suit by the same attorneys at Dallas and at Birmingham who had defended Hunter in his criminal trial, and who of course knew whether his testimony would be of value to their present client (Tr., 334, 257 and 261). No one but Hunter and Mrs. Smythe could tell whether she paid him any of this money. He was not asked to tell, and she refused to tell. Up to the time of Hunter's disappearance at the age of thirty-three he had accumulated practically nothing. After his disappearance, as a peddler of fruit trees, he made $40 to $50 per month. What he made as ped-

dler of sewing machines is not known; but somewhere he got the funds necessary to conduct a long and expensive fight against the charge of swindling, including the employment of able counsel in both Dallas and Birmingham, and repeated trips from Birmingham to Dallas by himself, his counsel, and other friends (Tr., 334-335).

MRS. SMYTHE'S DEPOSITION.

Mrs. Smythe repeats the story told on the trial of the insurance case about her accidental discovery of the insurance policies. She also says that there was no conversation or understanding at any time between herself and her brother on the subject of his having his life insured (Tr., 362 and 364). In this she contradicts her own statement, made in the supplementary proofs of death, that Hunter first mentioned to her the subject of insuring his life in January, 1897, in Mentone, Texas (Tr., 400). She tells of Milliken's supposed ill-treatment of her, and of the telegram incident (Tr., 363). Her version of this affair differs from his (Tr., 233-234); but equally with his it shows that she did not lose her self-possession or give credence to the telegram for a single moment. She goes over one by one the checks drawn on Wilson's bank before April 30, 1903, telling in whose favor and for what purpose they were drawn, but as to three checks in favor of her brother, C. E. Hunter, aggregating $275, and one check for $540 in her own favor, she fails to tell why they were made (Tr., 366); but perhaps this was unintentional. She says she first learned of Hunter's arrest through an article published in the Newark Tribune, April 29, 1903, and on account of that article withdrew her money from Wilson's bank in Utica the next morning. The Tribune is an evening paper, as is shown by the article itself, and by the copy of the paper attached to the deposition but not inserted in the print-

ed record. She was then in the country, some four or five miles from Utica, and some fifteen miles from Newark (Tr. 379, 288, 367, 381 and 383). It was somewhat remarkable that this paper should be sent out to her in the country on the evening of its publication, and very remarkable that she should act so promptly upon the information contained in it. In her deposition she says her brother had two little valises with him when he came to Pecos, and left them both with her, and that in one of them, in a pocket-book, she found the Paschal note (Tr., 376-377). In her evidence in the insurance case she mentioned only one valise (Tr., 485). Mrs. Miller, a wholly disinterested witness, whose testimony was obtained with difficulty, as her deposition shows, says that Hunter took his valise with him when he started to Mentone (Tr., 173 and 174). Mrs Smythe says she never sold any trunk, valise, clothing, or anything else belonging to her brother (Tr., 377). Quite an important feature of her evidence in the insurance case was her statement that she had sold his valise and clothing to some unknown second-hand dealer in Ft. Worth (Tr., 421), and that therefore they could not be produced in that case to contradict Mrs. Miller's testimony. She says she never knew anything about the Paschal note until she found it in the old pocket-book in the valise, that she had not heard of it before, that her brother had not mentioned it, and that she did not know of its existence (Tr., 377). In her supplementary proofs of death she said that she had known of the note ever since 1891 or 1892, and that when Hunter was in Pecos she asked him whether it had been paid, and he said that it had not, and that he had placed it in the bank at Gainesville for collection (Tr., 401). In her evidence in the insurance case, she undertook to give the contents of the valise, and did not mention either the note or the pocket-book (Tr., 421 and 422). She at first denies in the most

explicit terms that ever at any time after April 26, 1903, which was the day before Hunter's arrest, she received either directly or indirectly any communication either written or oral from her brother, William A. Hunter, or from any other person claiming to write or speak in his behalf (Tr., 379). Later she admits that "a lawyer sent a picture purporting to be one of his" (Tr., 383). Still later when asked whether she had had any communication with her brother since his arrest, she declines to answer, and in explanation of her refusal says that *her answer might tend to incriminate her* (Tr., 386). She contradicts in a very evasive negative-pregnant sort of way, the testimony of Mrs. Johnson, confirmed by that of her husband and the post-master, Sapp, regarding her statements to Mrs. Johnson about her brother's insurance (Tr., 369). She says she got her papers from W. H. Clark on her return from her trip to the City of Mexico (Tr., 370-371). In this she contradicts the itinerary of that journey given by her sister Clara (Tr., 317). Her only denial of a division of the spoils with her brother consists of her answers to grossly leading questions as follows: "Q. I will ask you whether William A. Hunter, your brother, prior to April 29, 1903, got any portion of that money which was received from William H. Clark by you? A. Not any at all. Q. Or whether you had promised him any, or agreed to pay him any part of it? A. I had never promised him any, or agreed to pay him any.—Q. Has your brother, to your knowledge, received any benefit whatever from the money which you had received from the suit in Dallas against the plaintiff? A. None that I know of. Q. *Had* you given him any property or anything of value for or on account of that money? A. Nothing whatever. Q. Or, *had* you directed any one else to do so? A. No, sir; I *hadn't*. Q. Did your attorneys pay him any part of the money before it came into your hands, that you have any

knowledge of? A. No, sir; not that I know of. Q. Or, was any such thing done by your attorney? A. No, sir; it wasn't done by my attorney.' (Tr., 367 and 371-372). These questions and answers are carefully framed, incomplete and evasive. They are far from being a statement that she never at any time, directly or indirectly, turned over to Hunter, or to any one else for his benefit, in any form, any portion of the fruits of the insurance policies; and when on cross examination she is asked for the particulars that would require direct and positive statements as to what she did with the money, over and over again she refuses to answer *on the ground that her answers might tend to incriminate her* (Tr., 381, 382, 384 and 386). She denies that she made oath in May, 1903, before the tax-assessor that she had no moneys or other personal property (Tr., 384-385). In this she is contradicted by the tax-assessor (Tr., 311-313), who is confirmed by the county auditor (Tr., 325-326).

11.

MISSING TESTIMONY.

In her answer, Mrs. Smythe says: "These defendants aver that they have no idea when the said Wm. A. Hunter left said camp, or the circumstances under which he left, or the reason which influenced him to leave the camp" (Tr., 82). She does not so testify. In her answer she admits the finding of the Powers horse at Barstow and says: "But how the said horse came to be there these defendants are not advised, and have no information or belief" (Tr., 82). She does not testify to her lack of knowledge. In her answer she alleges: "These defendants have no knowledge of where said William A. Hunter went after leaving the camp; they have no knowledge of the fact that he quitted the state of Texas and assumed a fictitious name, and ever thereafter concealed himself, so that he should not be found by the

plaintiff. These defendants deny that the said Wm. A. Hunter ever did attempt to conceal his person from the plaintiffs" (Tr., 82). Yet, strange to say, her deposition contains no assertion of her ignorance of Hunter's whereabouts, but leaves without denial the plaintiff's allegation that she did have such knowledge and concealed the same, supported as this allegation is by an abundance of circumstantial evidence. The plaintiff's bill avers as follows: "The inability of the defendant company to procure convincing evidence of the fact that Hunter had not been drowned, but was still living, was due solely to the studious care with which said fact was concealed by him, and, as the plaintiff verily believes, by her as well. The plaintiff has much reason to believe, and verily it does believe, that the defendant, Jennie M. Smythe, knew at all times that her brother, the said William A. Hunter, was not dead; and that she knew where he was and maintained a regular correspondence with him at all times during the pendency of said litigation; and that she actively and diligently aided him in planning and carrying out said fraudulent scheme and concealing himself from the plaintiff; and that both by deliberate concealment and by direct perjury she withheld from the court the true facts as the same were known to her, and prevented the plaintiff from procuring evidence to establish its defense" (Tr., 5-6). If there is in Mrs. Smythe's deposition an explicit denial of any of these important allegations of the bill, we have overlooked it. It is incredible that such omissions should be inadvertent. Especially is this so in view of the slowness with wnich she went to the witness stand, and in view of her refusal to answer so many searching questions upon the ground that her answers might incriminate her. There is another thing which is significantly absent from both the pleadings and the testimony. It nowhere appears that when Hunter

was proven guilty of fraud, Mrs. Smythe offered to restore to the insurance company so much as she yet had in her possession of its money which she had received as the beneficiary of that fraud. Had she been an honest woman, deceived by the circumstances indicating Hunter's death and so prosecuting and collecting her claim in good faith, her impulses would have driven her irresistably to the restitution of all that she yet had of the money out of which the insurance company had been defrauded in her behalf.

12.

THE INSURANCE COMPANY'S DILIGENCE.

Promptly on receiving notice of Hunter's death, the insurance company sent R. C. Milliken to Pecos to investigate, and Ab. Landis went to Homer to get a description of Hunter. Milliken stayed at Pecos about two weeks, and reported that Hunter had not been drowned, and that it was a case of fraud. From that time on, until the trial of the case in May, 1900, he was engaged in the matter, visiting many places in the course of his investigations. At Nashville, Tennessee, he examined the registers of all the principal hotels and boarding houses, trying to find Hunter's name; but, very naturally, he failed (Tr., 232). The company's agent at Nashville and a firm of lawyers there were requested to investigate the clew afforded by Wallace's report that he had seen Hunter, in addition to the work of inspectors sent there (Tr., 272 and 273). The company followed up every clew, and never ceased to prosecute the search until Hunter was found. It expended in the search about $5,000 aside from the salaries of those so employed, and these would increase the total expenditure to about $10,000. The first information the company had that Hunter had changed his name and assumed that of Hunt was when it heard of his arrest on April 27,

1903. Up to that time it had not been able to find any evidence not used on the trial of the insurance case (Tr., 272-273).

13.

Conclusion.

It seems to us that the circumstances of this case, as shown by the record, fully justify the finding of the learned district judge, hereinbefore reported as follows:

"I find from the evidence submitted in this case that the assured, William A. Hunter, is not dead, but living; and further, that the defendant, Jennie M. Smythe, and her brother, William A. Hunter, the assured, conspired together from the beginning, and concocted together the scheme to defraud the insurance company; that the inability of the insurance company to show on the trial of the case at law that Hunter had not met his death by drowning was due solely to the actions of himself and his sister Mrs. Smythe; that they concealed the fact that he was living, studiously, carefully, and persistently. I also find that diligence was used by the insurance company in attempting to ascertain and prove the fact that Hunter was living, on the trial of the insurance case, and that it was prevented from so doing by reason of the fraudulent conspiracy and acts of Jennie M. Smythe and her brother, the assured. —— The fact that Hunter was alive, was one of which the insurance company might have availed itself in the action at law, but it was prevented from so doing by the fraud of the defendant, Jennie M. Smythe, and her brother, the assured. There was no negligence on the part of the insurance company or its agents, which would preclude an appeal to a court of chancery. A great fraud was practiced upon the court, and an unconscientious advantage taken of the company without any fault or negligence on its part."

It remains to inquire what remedies a court of equity can offer to one against whom such a wrong has been perpetrated.

JURISDICTION OF THE COURTS.

1.

The Particular Courts.

The plaintiff was a citizen of Pennsylvania at the time of instituting the suit. The defendants Clark and Culberson were citizens of Texas and residents of Dallas County, which is in the Dallas division of the Northern District of Texas. The defendant Spoonts was a citizen of Texas, and a resident of Tarrant County, which is in the Ft. Worth division of the Northern District of Texas. The defendant Phillips Investment Company was a citizen of Missouri, and the defendants Jennie M. and James N. Smythe were citizens of Ohio. The judgment whose use by the defendants the plaintiff sought to restrain, was rendered in an action at law in the circuit court for the Dallas division of the Northern District of Texas, and the bill was filed in that court (Tr., 1-2).

Together with its bill the defendant filed a verified motion for the allowance of substituted service upon the defendants Jennie M. Smythe, James N. Smythe, and Phillips Investment Company, which motion was granted by the district judge in chambers (Tr., 22-25). The defendants Jennie M. and James N. Smythe filed a plea of their privilege to be sued in the Southern District of Ohio, but did not complain of any lack of due service upon them. They are not parties to this appeal. All the defendants who are parties to this appeal entered their general appearance, and filed demurrers and answers without objecting to the jurisdiction of the particular court in which the suit was brought (Tr., 25-26).

While for most purposes a bill in equity to restrain the use of a judgment at law is deemed a separate proceeding in personam, it is held that such a bill is so far ancillary to the original cause that the federal court upon whose law side the judgment was

rendered has upon its equity side jurisdiction of the bill without regard to the citizenship of the parties, and that it may summon them before it by substituted service.

> Logan v. Patrick, 5 Cranch 288; Dunn v. Clarke, 8 Peters 1; Freeman v. Howe, 24 Howard 450; Mil. and Minn. R. Co. v. Soutter, 2 Wallace 609; Jones v. Andrews, 10 Wallace 327; Krippendorf v. Hyde, 110 U. S. 276; Pac. R. Co. of Mo. v. Mo. Pac. R. Co., 111 U. S. 505; Webb v. Barnwall, 116 U. S. 193; Dunlap v. Stetson, 4 Mason 349; Hatch v. Dorr, 4 McLean 112; Williams v. Byrne, Hempstead 472; In re Sabin, 21 Fed. Cas. No. 12,195; Doe v. Johnston, 2 McLean 323; The Cortes Co. v. Thannhauser, 9 Fed. 226; McDonald v. Seligman, 81 Fed. 753; 1 Bates on Fed. Equity Procedure, §§ 46 and 157.

The application of this principle is not confined to cases in which the parties to the suit in equity are identical with those to the action at law. It is sufficient that all parties to the chancery suit be privy to the judgment at law.

> Dunn v. Clarke, 8 Peters 1; Freeman v. Howe, 24 Howard 450; McDonald v. Seligman, 81 Fed. 753.

The bill shows the sum of money received by each defendant, and under what title he received it. The prayer is for an injunction against each and all of the defendants, and for a decree requiring each to return with interest the amount by him severally received. One of the grounds of the original demurrer of all the defendants other than the Smythes is: "because it does not appear that they or either of them are necessary or proper parties to said bill of complaint." In a separate demurrer filed by Phillips Investment Company, one of the grounds of objection

is that the bill is multifarious in that there is no privity between it and the Smythes. The amended demurrer filed by all except the Smythes again emphasizes the difference between the position of the Smythes and that of the demurrants. The defendants who are parties to this appeal have all the defenses which the Smythes have, and others besides. They ask for no relief against one another or against the Smythes, nor do the Smythes ask any against them. The decree gives to the plaintiff all it asks against the Smythes, and nothing against the other defendants. All through the litigation, from bill to decree, the position of the Smythes has been kept wholly separate from that of the other defendants. Under these circumstances the decree is so far separable as to permit the plaintiff to appeal from that portion thereof which is adverse to it without bringing into this court the Smythes, against whom it has obtained all the relief sought.

Cox v. United States, 6 Peters 172; Forgay v. Conrad, 6 Howard 201; Brewster v. Wakefield, 22 Howard 118; Germain v. Mason, 12 Wallace 259; Simpson v. Greeley, 20 Wallace 152; Milner v. Meek, 95 U. S. 252; Basket v. Hassell, 107 U. S. 602; Hanrick v. Patrick, 119 U. S. 156; City Nat. Bank v. Hunter, 129 U. S. 557; Gilfillan v. McKee, 159 U. S. 303; Mercantile Trust Co. v. Adams Express Co., 7 C. C. A. 3; Grand Island etc. R. Co. v. Sweeney, 43 C. C. A. 255; Gray v. Havemeyer, 3 C. C. A. 497.

All the defendants made parties to this appeal questioned the jurisdiction of the circuit court to entertain the suit on the ground that such jurisdiction was denied to it by the Seventh Amendment to the Constitution of the United States, reading as follows: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a

jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law" (Tr., 26, 51 and 72). The decision of the circuit court was against the defendants and in favor of the plaintiff upon this point.

Section 5 of the act of March 2, 1891, provides for a direct appeal from a circuit court to this court "in any case that involves the construction or application of the Constitution of the United States." The statute does not make it an essential element of the right of direct appeal to this court that the decision of the circuit court upon the constitutional question should have been adverse to the appellant. It is sufficient that the construction or application of the constitution be involved in the case.

> Holder v. Aultman, Miller & Co., 169 U. S. 81; Loeb v. Trustees of Columbia Township, 179 U. S. 472; Field v. Barber Asphalt Paving Co., 194 U. S. 618.

The jurisdiction of this court is not confined to the constitutional question, but extends to the entire case: Field v. Barber Asphalt Paving Co., 194 U. S. 618, and cases there cited.

2.

THE CONSTITUTIONAL QUESTION.

The question to be considered is whether the circuit court and this court are deprived of jurisdiction to entertain the plaintiff's bill by the last clause of the Seventh Amendment to the Constitution of the United States, which reads as follows: "And no fact tried by a jury shall be otherwise reexamined by any court of the United States than according to the rules of the common law." The judicial power of the federal government extends "to controversies—between citizens of different states:" Constitution, Art. 3, §2. The original cognizance of the circuit court includes "all suits of a civil nature, at common law or

in equity,—in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value" of $2,000: 25 Stat. at L. 433, §1.

The words "common law" and "equity" as used in the constitution are to be interpreted by reference to the laws of England as they existed at the time of the American revolution. Generally speaking, the jurisdiction in equity of the federal courts is coextensive with that of the English high court of chancery of that period: State of Pennsylvania v. Wheeling etc. Bridge Co., 13 Howard 518; Mississippi Mills v. Cohn, 150 U. S. 202. What sort of reexamination of facts tried by a jury was then "according to the rules of the common law," and so permitted by the seventh amendment, is therefore to a great extent a question of English history.

While Sir Thomas More was lord chancellor of England (1529-1532), in the time of Henry VIII, he granted injunctions against judgments of the common law courts whenever it seemed to him that wrong would result from their refusal to remedy the effect of accident or to prevent secret frauds from being profitable to the parties concerned in them, a practice which had its beginning at a considerably earlier date. The judges having complained of this, he caused a docket to be made of such injunctions, allowed or pending, invited all the judges to dine with him, explained to them the grounds upon which each case proceeded, and drew from them the unanimous admission that they themselves could not have done otherwise. He then proposed to them that if they would grant the necessary relief from the law's rigor, he would issue no more injunctions. Upon their refusal, he is reported to have said: "Forasmuch as yourselves, my lords, drive me to that necessity for awarding out injunctions to relieve the people's injury, you cannot hereafter any more justly blame me:" 2 Campbell's Lives of the Chancellors 34.

About 1589, in the reign of Elizabeth, a barrister was indicted under the statutes of praemunire for having signed a bill in chancery praying for an injunction against a common law judgment. But the case was not brought to trial, and the controversy between the courts rested for a quarter of a century: 2 Campbell's Lives of the Chancellors 342.

In 1616, in the reign of James I, when Lord Ellesmere was chancellor and Lord Coke was chief justice of the king's bench, the quarrel was revived, and fought out to the finish. Coke's contention was that the court of chancery had no right to interfere with an action at law, and that an attempt to reexamine in chancery the final judgment of a law court was criminal under the statutes of praemunire. Accordingly he pronounced judgment in a case in which Ellesmere had granted an injunction to stay proceedings; he discharged on habeas corpus a person whom Ellesmere had committed for breach of an injunction against suing out execution on a judgment; he threatened to disbar any lawyer who should "put his hand to a bill in any English court after a judgment at law;" and together with another judge of the king's bench, he delivered an opinion that the interposition of equity in actions at law was illegal. Finally a case arose in which the plaintiff in an action in the court of king's bench obtained a judgment by decoying the defendant's witness away from court. The defendant applied to the chancellor for relief, and was accorded a decree restraining execution of the judgment. Coke pressed another judge to charge the grand jury to inquire of all such persons as questioned judgments at law by bill or petition in the court of chancery; and himself threatened to commit the grand jury for refusal to indict. Thereupon, Ellesmere submitted to King James the question: "whether upon an apparent matter of equity which the judges of the law by their place and oath cannot meddle with or relieve,

if a judgment be once passed at common law, the subject shall perish, or that the chancery shall relieve him? and, whether there be any statute of praemunire, or other, to restrain this power in the chancellor?" The king referred the question to a committee of eminent lawyers, who reported that the statutes of praemunire did not apply to such a case, that the chancellor's action was sustained by reason and by many precedents running back to the time of Henry VIII, and that he had jurisdiction to examine the judgments of the courts of the common law, and to stay execution thereon, if he should find that they had been obtained by fraud, for which those courts could not afford sufficient remedy. Thereupon an order was entered to the effect that the chancellor had not exceeded his authority. Coke submitted; and ever thereafter the court of chancery exercised without interference or resistance its jurisdiction to restrain the use of fraudulently procured judgments, though in theory its right so to do was sometimes doubted until about the end of the seventeenth century. Long before the American revolution, the question had ceased to be mooted; and Sir William Blackstone, who was a common law judge, and whose Commentaries had a very large sale in America and frequently were cited in the debates on the constitution, declared that Coke "was clearly in the wrong."

3 Blackstone's Commentaries *53; Hallam's Constitutional History of England (Chapter 6) 247; 1 Campbell's Lives of the Chief Justices 332; 2 Campbell's Lives of the Chancellors 362; 3 Pomeroy's Equity Jurisprudence, §1360; 1 Story's Equity Jurisprudence §51; 1 High on Injunctions, §112.

In a pamphlet written by Lord Ellesmere, entitled "The Priviledges and Prerogatives of the High Court of Chancery" and published in 1641 after his death, the chancellor said: "The Common Law hath

alwaies allowed the proceedings in the Chancery, in cases of conscience and equity; and therfore the words (to doe the common law) must not be construed too precisely, as thereby stop all Courts of equity, for it standeth with the common law, as well that equity and conscience bee ministered, where the common law cannot helpe, as that strict justice be ministered according to the common law, when the common law may serve. The Chancery doth not commonly send any Writ or Commandment to the judges, under the great Seale comanding them to stay to do justice, but awardeth injunction to the parties, that seeke to have the advantage of the strictnesse of the common law, against equity and conscience: neverthelesse there be plentiful examples that Writs of *supersedeas*, under the great Seale have beene directed to the judges, in diverse speciall causes, and have in all times (untill of late) beene dutifully obeyed, as in cases of priviledge and to stay their proceedings: *Reges in consulto* and divers others, &c." Upon this theory, it seems, Ellesmere proceeded in his controversy with Coke.

From the foregoing examination it appears that when our constitution was adopted, it had been for a century the thoroughly established and universally admitted "rule of the common law" to submit its verdicts and judgments to reexamination in chancery for fraud practiced in their procurement, and for other causes which need not be specified here. It is impossible to doubt that but for the existence of this acknowledged rule, sometime between 1616 and 1789, such common law judges as Hale, Holt, Hardwicke and Mansfield would have devised, or the parliament would have supplied, some other remedy for the obvious injustice of permitting one to enforce a judgment fraudulently obtained.

The Articles of Confederation adopted in 1778 having proven insufficient for the needs of the United States, they appointed delegates to a federal conven-

tion which should consider the faults in the existing constitution, and devise a remedy therefor. The convention assembled in Philadelphia May 25, 1787, and continued in session nearly four months; when it reported to the congress of the confederation the constitution as it now exists, save for the fifteen amendments. September 28, 1787, the congress resolved that the report be transmitted to each state for [illegible]ion to a convention of delegates chosen by the people thereof. In 1787 and 1788, Delaware, Pennsylvania, New Jersey, Connecticut, Georgia, and Maryland ratified the constitution without suggestion of amendments, and Massachusetts, South Carolina, New Hampshire, Virginia, and New York ratified it with specifications of 9, 4, 12, 20 and 32 amendments which they respectively desired; while North Carolina submitted a declaration of rights and 26 amendments, which it wished to have considered before it should ratify the constitution. At the first session of the congress under the constitution, held in 1789, these 103 proposed amendments, many of which covered common ground, were considered, and from them 12 were prepared, passed and submitted to the states; which ratified all but the first two. Such in outline is the history of the adoption of the constitution and the first 10 amendments. Pending its adoption, the constitution was considered with almost unexampled fullness of debate by the federal convention and the state conventions, and in pamphlets and the newspapers; and much of this contemporary discussion is still extant.

The constitution as reported by the federal convention and submitted to the states, provided for jury trial in criminal cases, but was silent as to the mode of trial in civil cases. It was provided that in all cases the supreme court's appellate jurisdiction should extend to both law and fact with such exceptions and under such regulations as the congress

should make: Article 3, §2. These provisions were very unsatisfactory to the people, chiefly for two reasons: (1) they wished an explicit guaranty of the right of trial by jury in all cases in which such trial had been usual; and (2) they did not wish the verdicts of juries in such cases to be subject to revision on appeal.

The first congress of delegates had unanimously resolved on October 14, 1774, "that the respective colonies are entitled to the common law of England and more especially to the great and inestimable privilege of being tried by their peers of the vicinage according to the course of that law:" 1 Elliott's Debates 44. All the states had the institution of trial by jury; but they differed widely in the extent to which they employed it, and in none of them were all civil cases so triable. It was the difficulty of harmonizing these divergent systems, and not any desire of innovation, which led the federal convention to frame the judiciary article so broadly and to leave it to the congress to make all needed adjustments.

Madison's Journal, Sept. 12, 1787; 2 Elliott's Debates 114 and 488; 3 idem 68, 468 and 519; 4 idem 144, 260 and 307; Federalist Papers, Essays 81 and 83.

We have examined with care the official journals of the federal convention, Madison's Journal and Yates's Minutes of the debates in that convention, all the amendments proposed by the states, the debates in the various state conventions as compiled by Elliott, the Annals of the First Congress, Gales and Seaton's Journal of the First Session of the Senate, the Federalist Papers, and the histories of Bancroft, McMaster, Schouler, Winsor, Fiske, Von Holst and Thorpe. With all this research, we have not found so much as a single word which indicates that any person whatsoever doubted the propriety of the established jurisdiction of courts of chancery to review

judgments at law for fraud, or supposed that the federal courts would not or should not be vested with that jurisdiction to its fullest extent. But, on the contrary, we find that in the Virginia convention it was suggested that a cause of action might be assigned for purposes of suit to a citizen of another state, and so the defendant be sued away from home, out of reach of his witnesses, and have an unjust judgment rendered against him; and we find that besides other answers to this suggestion the following was made by no less a personage than John Marshall: "It is *possible* in our courts, as they now stand, to obtain a judgment for more than justice. But the court of chancery grants relief. Would it not be so in the federal courts? Would not depositions be taken to prove the payments; and if proved, would not the decision of the court be accordingly?" 3 Elliott's Debates 557.

So far as we have been able to ascertain the spirit of the age, the wish of all parties was that the jurisdiction and procedure of both law and equity courts should remain substantially as they had existed for many years, but some wished a constitutional guaranty of continuance in the ancient ways, while others thought it wiser to leave the details to the congress. The seventh amendment was adopted for the sole purpose of providing the desired constitutional guaranty, and should be construed in the light of its history. It remains to inquire what construction has in fact been placed upon it. But first it is worth noting that most of the state constitutions guarantee the right of trial by jury, and that their variously worded provisions on this subject always are held merely to preserve the right as it existed when the constitution under consideration was adopted: Cooley's Constitutional Limitations 504.

We have made an extended search, but have been unable to find a single case in any court, federal

or state, where the right of a court of equity to re-examine for fraud a judgment or a verdict at law was the matter under consideration, and where it was either decided or stated that courts of the United States sitting in equity had not that power.

It has been held that the first clause of the seventh amendment, "correctly interpreted, cannot be made to embrace the established, exclusive jurisdiction of courts of equity, nor that which they have exercised as concurrent with courts of law."

Shields v. Thomas, 18 Howard 253; Waring v. Clarke, 5 Howard 441; Barton v. Barbour, 104 U. S. 126.

It was held under the old law concerning removal of causes that the second clause of the seventh amendment did not prevent the removal of a case to the federal court, and its trial there, after it had been tried by a jury in a state court and the verdict had been set aside: Home Life Ins. Co. v. Dunn, 19 Wallace 214.

It has been held that in the trial of an equity case in a federal court, the judge may call in a jury to find upon issues, or may have a jury empaneled upon the law side of the court and its verdict certified to him, and that in either case the verdict is not binding upon him, but is advisory only. This is in accordance with the long established practice of courts of chancery; but it would seem contrary to the letter of the seventh amendment, and justified only by historic interpretation.

Prout v. Roby, 15 Wallace 472; Garsed v. Beall, 92 U. S. 684; Wilson v. Riddle, 123 U. S. 608; Idaho and Or. Land Co. v. Bradbury, 132 U. S. 509.

It was held by Mr. Justice Matthews, sitting on circuit, that an appeal lay to the circuit court from the district court in an admiralty case tried before a

jury, and that on appeal the case should stand for trial precisely as if there had been no jury, the seventh amendment being inapplicable: Boyd v. Clark, 13 Fed. 908.

In 1837, a policy of marine insurance was fraudulently procured, and the ship was fraudulently cast away and sunk. In 1838, a judgment was rendered against the insurance company by a circuit court of the United States in an action at law upon the policy, which was tried before a jury, and wherein these frauds were set up in defense. Having paid the judgment, the company brought an equity suit in the same court in 1841, to set aside the judgment and recover the money paid. The same matters were in issue, but there were newly discovered evidence and an additional element of fraud. The case was elaborately argued by able counsel, and was very fully considered by Mr. Justice Story, who overruled the demurrers: Ocean Insurance Co. v. Fields, 2 Story 59. The effect of the seventh amendment was not discussed; but it was necessarily involved, and the question of jurisdiction was considered on other objections. Before this time Mr. Justice Story had rendered the opinion in Parsons v. Bedford, had sat on the bench of this court for thirty years, and had published his Commentaries on the Constitution and his Commentaries on Equity Jurisprudence. He could not have overlooked the seventh amendment, had it been applicable to the case.

An action for damages was brought in a state court in Iowa against two men for assault. One of the defendants paid the plaintiff $100 for a secret release, and thereafter assisted in prosecuting the action for the joint benefit of himself and the plaintiff, and in obtaining by false testimony a verdict of $4,000 against the other defendant. The latter, having removed to another state and discovered the fraud, filed in the United States circuit court a bill in equity

to set aside the judgment, cancel execution sales made thereunder, and compel an accounting for the proceeds of the property sold. Judges Shiras and Woolson, sitting together, overruled the demurrers; but the question of the seventh amendment does not appear to have been raised: Young v. Sigler, 48 Fed. 182.

One Crim was sued at law upon promissory notes, and pleaded payment, failure of consideration, and other defenses. The case was tried before a jury, and resulted in a judgment against him. He then filed in the United States circuit court a bill in equity to enjoin the judgment because it was unjust, and because he had not had a fair trial in that sickness rendered his principal witness unable to testify, one of his counsel was unexpectedly absent, and he was unable to find certain documentary evidence. The circuit court dismissed his bill, and he appealed to this court. After stating the grounds upon which relief might be had in chancery from a judgment at law, this court, speaking through Mr. Justice Clifford, said: "Parties in suits at common law, where the value in controversy exceeds $20, are entitled to a trial by jury; but the same amendment to the constitution provides that no fact tried by a jury shall be otherwise reexamined by any court of the United States than according to the rules of the common law. ——— All suits not of equity or admiralty cognizance are embraced in that provision, and subject to its control. By its terms it is applicable only to common law suits, *and, of course, does not conflict with the rule before stated, that courts of equity may exercise jurisdiction to enjoin a judgment or to grant the injured party a new trial, in a case where the proof is clear, to show that it would be inequitable and against conscience to execute it*; as where it appears that the injured party had an equitable defense of which he could not avail himself in the suit at law, or if it appears that the defense

could be made at law, but that he was prevented from making it by fraud or unavoidable accident, unmixed with any fault or negligence in himself or his agents." The court then proceeded to examine each of the grounds upon which the bill sought relief, and to hold them all insufficient, as plainly they were: Crim v. Handley, 94 U. S. 652.

Embry sued Stanton and Palmer at law in the supreme court of the District of Columbia, to recover upon a quantum meruit the value of professional services rendered. The case was tried before a jury and he recovered a judgment for $9,185.18, which was affirmed by this court upon writ of error: Stanton v. Embry, 93 U. S. 548. He then sued upon his judgment in a state court of Connecticut; whereupon they filed in the same court a bill in equity to restrain for constructive fraud in its procurement all proceedings to collect the judgment, save as to $2,296.29 admitted to be due. The supreme court of Connecticut sustained the bill: Stanton v. Embry, 46 Conn. 65 and 595. Upon writ of error this court held:—(1) That the judgment was entitled to the same faith and credit in Connecticut as in the District of Columbia, and that therefore the question was whether a court of the District could have restrained the execution of the judgment upon the averments of the bill. (2) That the court of the District of Columbia was a court of the United States. (3) That the sufficiency of the bill must be tested by the decisions of this court in several cases that "A court of equity does not interfere with judgments at law unless the complainant has an equitable defense, of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents." (4) That the facts averred and found did not come up to this standard.

This necessarily involved a holding that a chancery court of the District of Columbia, a court of the United States, could reexamine and enjoin a judgment of a law court of that District though based upon the verdict of a jury. No question appears to have been made about the seventh amendment; but in discussing the merits of the case the court cited Crim v. Handley, and its attention must have been called to the amendment by reading that case: Embry v. Palmer, 107 U. S. 3.

Phillips sued Negley at law in the supreme court of the District of Columbia, and the latter denied all liability. The case was tried before a jury in the absence of Negley and his attorney, and a verdict was rendered for the full amount. After the expiration of the term, Negley filed a motion to vacate the judgment for fraud in its procurement, and the motion was granted. On writ of error this court held that the appropriate relief from a judgment at law wrongfully obtained is by a bill in equity; and that the power of a court of the District of Columbia over its judgments does not extend to their vacation for such reasons after the term at which they are rendered, "unless it is invoked in a formal bill in equity upon grounds recognized as furnishing a title to relief." It should be remembered in this connection that courts of the District of Columbia are courts of the United States, and subject to the provisions of the seventh amendment; and that the bearing of that amendment upon the case must have been called to the attention of the court by the decision in Crim v. Handley, which it cited: Phillips v. Negley, 117 U. S. 665.

RELIEF AGAINST FRAUDULENTLY PROCURED JUDGMENTS.

1.

Extrinsic Fraud.

Having reached the conclusion that the court in which the bill was filed and this court have jurisdiction to entertain it, the next question to be considered is whether the situation described by the bill is such as to entitle the plaintiff to relief under the established doctrines of equity. The fourth ground of demurrer urged by the defendants who are parties to this appeal is: "Because it appears that the fraud charged against their codefendants was the material issue in said trial of said former suit" (Tr., 26).

We do not think it properly can be said that the fraud of William A. Hunter and Jennie M. Mettler, which forms the basis of the present bill, was the material issue in the action at law of Mrs. Mettler against the insurance company. Ordinarily issues are presented by the pleadings in a case. In Mrs. Mettler's action against the insurance company she alleged "that the said William A. Hunter died on or about the 4th day of December, 1896" (Tr., 11); and again, "that the said William A. Hunter met his death, as aforesaid, on or about the 4th day of December, 1896, in the waters and quicksands of the Pecos River, being drowned near what is known as the 'Texas Bend' in said river, while camping with a two-horse wagon on his way from Pecos, in Reeves County, Texas, to Mentone, in Loving County, Texas, his drowning not being discovered until December 27th, 1896, and his body never being recovered" (Tr., 12). The defendant raised an issue upon these allegations merely by a general denial (Tr., 17-18). The pleadings made no issue of fraud, and if any such was involved in the case, it was so only indirectly, and because the evi-

dence seemed necessarily to prove either Hunter's death as alleged or his fraudulent disappearance.

The real issue presented by the pleadings in the action at law was the very simple one whether Hunter died at the time and place and in the manner set forth in the plaintiff's petition. In substance the bill charges that the verdict and judgment to the effect that he did so die were obtained (1) by the fraudulent manufacture of a chain of circumstantial evidence tending to show that he had so died; and (2) by the willful concealment from the court and from the defendant company of important evidence that Hunter was not drowned as alleged, that is to say, by the concealment of Hunter's living body, or the fact that he was still alive. Further it charges that the company exerted itself to the utmost to find evidence to make good its denial of Hunter's death, but that the concealments practiced by Hunter and Mrs. Mettler prevented it from doing so, until a few days before the filing of this bill, and several months after the judgment had been rendered, affirmed, and paid off. At that time, so the bill avers and the proof shows, an agent who had been employed by the company for several years in searching for Hunter, found him living in Alabama under an assumed name, and caused him to be confined in jail pending his extradition to Texas. By such devices the bill and the evidence show that the company has been swindled out of about $25,000. We believe that these facts measure up to the requirements of the strictest rules ever laid down by any court upon this subject.

In the language used by Mr. Justice Miller in announcing the decision of this court in the case of United States v. Throckmorton, 98 U. S. 61, counsel for the defense will find their strongest support. He said: "The acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court

of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered." This language needs to be interpreted in the light of the facts.

In pursuance of the treaty with Mexico, the United States created a special tribunal, a board of commissioners, to which all holders of Spanish or Mexican land grants in California were required to submit their titles for confirmation and patent. From the board of commissioners appeals might be taken to the district court, acting under special authority and trying the cases de novo, and thence to this court. The decisions of the tribunals so constituted were declared to be final.

The Throckmorton case was one of three companion cases, heard together in the circuit court and reported there under the name of United States v. Flint, 4 Sawyer 42. They involved thousands of acres of land, and their pendency indirectly cast a cloud upon the titles of a large portion of California. Some or all of the original claimants were dead, and the lands had passed into the hands of others who had made valuable improvements thereon.

The suits, though brought in the name of the United States, were not instituted by the attorney general as they should have been, but by the district attorney and apparently at the instigation of speculators. This fact alone was held to be sufficient ground for their dismissal. There was, besides, a doubt as to the jurisdiction of the court to review the proceedings of the special tribunals. Such was the general atmosphere of the cases.

The suits were brought in the circuit court to cancel patents issued by the United States to the claimants, and to set aside the decrees of confirmation rendered by the commissioners and the district court. In the Throckmorton case the petition for

confirmation was filed with the commissioners in 1852. Their decree of confirmation was rendered in 1853, and affirmed by the district court in 1856; and the appeal of the United States to this court was dismissed by the attorney general in 1857. The bill to set aside the decree was filed in 1876, more than twenty years after its affirmance by the district court. The gravamen of the bill was that the written grant filed in the case had been fraudulently executed after the petition for confirmation was filed, and antedated so to appear to have been made at the proper time, and supported by perjured depositions. This written instrument appears to have been like other deeds, *not merely evidence of a conveyance, but the conveyance itself.* The only question controverted before the commissioners and the district court was the genuineness and validity of this grant; and the government's law agent seems to have had notice from papers in another case that it was fraudulent. The original archives were at all times in the possession of the United States; and the grant itself was on file in the suit for more than four years before the final decree of the district court was rendered. The bill did not set up any newly discovered evidence and excuse its late production, but rested upon the bald assertion that the grant was fraudulent and supported by perjury. In the circuit court Judge Hoffman thus stated the merits of the case:

"It is in effect contended that where a party has been forced to commence a suit to establish the genuineness of a document, and the suit is tried on that issue, his adversary may omit to bring forward proofs of its fraudulent character which are in his own possession, and which by reasonable diligence he might have produced; and afterwards, when judgment has gone against him, may ask a court of equity to set aside that judgment and retry the same issue, not on the ground of newly discovered evidence which could not by reasonable diligence have been procured, nor

on the ground of fraud practiced in the course of the proceedings, but on the allegation that the document adjudged to be genuine was in fact fraudulent, and that he believed in and was misled by the assertion of its genuineness made by his antagonist. And further, that this belief in the assertions of his adversary should excuse him for his laches in not producing proofs of the fraud in his own possession on the trial of the suit which he has himself compelled his adversary to bring to determine that very issue. A statement of this position is its own refutation."

As applied to and explained by the facts involved in the Throckmorton case, the language used in its decision is unexceptionable. But as laying down a general principle for future guidance the courts have not always found it apt. See Marshall v. Holmes, 141 U. S. 589; Graver v. Faurot, 64 Fed. 241, 73 Fed. 1022, 162 U. S. 435, and 76 Fed. 267; Maddox v. Apperson, 14 Lea 596 (615). What then is the true rule as applied to such facts as are here in question?

More than ninety years ago Chief Justice Marshall stated as follows the law relating to equitable relief from judgments improperly obtained, in language which ever since has been quoted or paraphrased by almost every American court with approval and without betterment:

"Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. On the other hand it may with equal safety be laid down as a general rule that a defense cannot be set up in equity which has been fully

and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law:" Marine Insurance Co. v. Hodgson, 7 Cranch 332.

In New York Life Insurance Company v. Bangs, 103 U. S. 780, Mr. Justice Field set forth more fully those phases of the rule which are applicable to the present suit, as follows:

"A suit in equity will not lie to give effect to defenses against a claim when they might have been fully set up in an action at law. There must have been some fraud practiced upon the court or some unconscientious advantage taken of the defendant without any fault or negligence on his part; or there must be some newly discovered evidence which could not have been obtained at the trial and which, if produced, would have changed the result, before a court of equity will interfere with the judgment rendered or the contract upon which it was recovered."

We believe that the two passages above quoted express the law of the case at bar; and also believe that its facts come within the rule of the Throckmorton case when that rule is properly interpreted and understood. The question settled by the decree atacked in the Throckmorton case was whether a deed was genuine. It was alleged by the plaintiff that it was not genuine. It was not claimed that any fraud had been perpetrated in the course of the legal proceedings, save that there had been perjury. The deed whose genuineness was attacked had been on file among the papers of the case for four years before the rendition of the decree, open to inspection; and all the evidence had been continuously in the possession of the government, with notice of the facts. The case was simply one of negligence upon the part of the representative of the government, the fraud charged occurring not in the conduct of the litigation, but in the creation of the thing about which the contention arose. In the present case there were genuine policies of insurance maturing upon the death of Hunter,

and the question at issue was whether he was dead. the plaintiff sought to prove his death by circumstantial evidence, all of which was deliberately and fraudulently manufactured for the purpose of being used as it was used: this was the affirmative side of her case. The living body of Hunter produced in court or identified by credible witnesses who knew the man, would have been conclusive evidence in the defendant's favor. This evidence Mrs. Mettler, in collusion with Hunter himself, concealed from the defendant and from the court, both by artifice and by direct perjury: this was the negative side of her case. Thus was the defendant prevented by fraud, without any fault or negligence in itself or its agents, from availing itself of a perfect defense which it had in the court of law. Thus was a fraud practiced upon the court, and an unconscientious advantage taken of the defendant, without any fault or negligence on its part. In the finding of Hunter's living body is newly discovered evidence which the bill offers to the court, and which could not have been produced on the trial at law, and which if produced would have changed the result. These frauds, in the language of the Throckmorton case, were "extrinsic or collateral to the matter tried by the first court," which was the simple question whether Hunter was dead: they were frauds connected with the litigation, and not merely with the cause of action.

The proposition that a court of equity will grant relief under such circumstances as we have here is supported by numerous decisions ancient and modern, among which are the following.

In 1691 the English court of chancery ordered a new trial of an action at law wherein the plaintiff by surprising the defendant had recovered a judgment against him on a forged bond, all the pretended witnesses to which were dead. The details of the case are not reported: Coddrington v. Webb, 2 Vernon 240.

Bonds issued by Lafayette County, Missouri, and owned by a citizen of Missouri, were valid according to the doctrines of the federal courts and invalid according to those of the state courts. Because of this situation, the owner made a fictitious assignment of the bonds to a citizen of Illinois, who sued on them in the federal court, and assigned back to the true owner the judgment which he there recovered. The plaintiff's ownership of the bonds was alleged and was necessarily involved in the case; but the falsity of the allegation being unknown to the defendant it was not controverted. For this fraud in the procurement of the judgment the supreme court of Missouri held that the owner should be perpetually enjoined from making any use whatever of it. The court said, speaking of the plaintiff and his assignor: "Not only was the true ownership of the bonds known to them, but the false appearance of ownership was a fact of their own creation, concocted for the purpose of deceiving the court into entertaining a case, which, if the truth appeared, it would have rejected on the ground that it had no jurisdiction:" Wonderly v. Lafayette County, 150 Mo. 635.

One Guild bought land and had it conveyed to his wife. Quarrelling with her, he caused his sister to sue him on a note, obtain a judgment, and levy her execution on the land under the claim that the debt antedated the voluntary conveyance. The wife filed a bill to enjoin the sale on the ground that the debt was fictitious, and the judgment collusively procured for the purpose of defrauding her. Guild and his sister testified that the debt was bona fide. The suit was then compromised, the wife taking half of the land and the execution resting on the other half. On his death bed Guild confessed to his wife that the judgment was fraudulent; and after his death she found among his papers a release signed by his sister, antedating the action on the note. She then sought

to set aside the decree in the injunction suit because of the fraud and the newly discovered evidence establishing the same. The sister demurred on the ground that whether the debt was fraudulent or bona fide was the issue made and settled in the injunction suit. The court overruled the demurrer, and on final hearing set the decree aside: Guild v. Phillips, 44 Fed. 461.

The case of Ocean Insurance Co. v. Fields, 2 Story 59, decided by Mr. Justice Story on circuit in 1841, and hereinbefore cited for its bearing on the constitutional question, was a bill to set aside a judgment rendered at law on a policy of marine insurance, and to recover the money paid thereon. The grounds were that the owner of the vessel had procured the insurance upon her by over valuation, and afterwards had bored holes in her bottom and cast her away for the purpose of wrecking her. Counsel for the company in his argument upon the demurrers made the following admission: "We admit that on the trial of this case it will appear that on the former trial the defendants alleged in defense the misrepresentation of the value of the vessel, and the attempt and design to cast her away on Mud Island, and failed to prove them. But we aver, that the distinct fraud of boring the vessel was (not) then alleged or suspected by us; and we admit that if an unsuccessful attempt to prove a fraud at the former trial takes from the plaintiffs the right now to show the same or other distinct and more gross frauds, we have no case." The demurrers were overruled, and in discussing this aspect of the case Mr. Justice Story said:

"But the parties admit, for the sake of the argument, that the point of fraud was made at the trial; but that it was in effect founded upon circumstances of suspicion, not sustained by any clear and satisfactory proofs; and that the boring of the holes was not known or suspected at the trial; and that it was not and could not therefore then be a matter of controversy. Now I agree that mere cumulative evidence

to the fact of fraud or any other leading fact not discovered since the trial, will not ordinarily constitute any just ground for the interference of a court of equity to grant relief, for the solid reason that it is for the public interest and policy to make an end of litigation, or, as was pointedly said by a great jurist, 'that suits may not be immortal, while men are mortal.' But I do not know that it has ever been decided that, in an assignable case, where the defense has been imperfectly made out at the trial, from defect of real and substantial proofs, although there were some circumstances of a doubtful character, or some presumptions of a loose and indeterminable bearing before the jury, and afterwards newly discovered evidence has come out, full, and direct, and positive, to the very gist of the controversy, a court of equity will not interfere to grant relief and sustain a bill to bring bring forth and try the force and validity of the new evidence. My recollection does not furnish me with any case, where a doctrine so strict and so binding has been positively upheld and pronounced. The disposition of courts of equity upon this head, seems, as far as I can gather it, not to encourage further litigation in cases of this sort; but, at the same time, not to assert their own incompetency to grant relief, if a very strong case can be made out. A fortiori all reasoning upon such a point must be powerfully increased in strength, when it is applied to a case, which, upon the face of the bill, is composed and concocted of the darkest ingredients of fraud, if not of crime."

Christina Trefz sued Knickerbocker Life Insurance Company at law in a circuit court on two life insurance policies. The company's defense was that the applicant had made untrue statements regarding his health and habits. The case was tried before a jury, and at the trial the defendant abandoned its allegation of misstatements concerning habits because unable to prove them. Judgment was rendered against the defendant in 1877: 6 Ins. L. J. 850. Upon writ of error this court affirmed it in 1881: 104 U. S. 197. While the case was pending in this court, in 1881, the company, having discovered evidence es-

tablishing its defense based upon the applicant's misstatements about his habits, filed in the circuit court a bill in equity to declare the judgment fraudulent and to restrain its execution. The court stated the ground of relief to be: "That the two policies of insurance on which the judgment is founded were obtained by the fraud of the defendant and her deceased husband; that the fraud was unknown to the complainant at the time of the trial although it was suspected, and efforts were made to find evidence of it, and that it was known and concealed by the defendant on the trial so that the verdict was fraudulently obtained in her favor." While the writ of error was still pending, the court overruled the demurrers and required the defendant to answer: Trefz v. Knickerbocker Life Ins. Co., 8 Fed. 177.

David Mayer recovered twenty-four small judgments at law against Sarah F. Marshall in a court of the state of Louisiana on contracts made by her agent. The defense was want of authority in the agent to make such contracts. Mrs. Marshall filed in a state court a bill to enjoin all the judgments on the ground that the letter showing authority was forged, if it ever existed, and that she had newly discovered evidence to prove such forgery and fraud. Afterwards she sought to remove the cause to the federal court and the state court denied her right to do so. The question coming before this court upon a writ of error, it was held that the right of removal existed. Mr. Justice Harlan, in delivering the unanimous opinion of the court, entered at length into a discussion of the circumstances under which a court of equity will relieve against judgments at law, and in conclusion said: "While the court upon final hearing, would not permit Mrs. Marshall, being a party to the actions at law, to plead ignorance of the evidence introduced at the trial, it might be that relief could be granted by reason of the fact, distinctly alleged, that some of

the necessary proof establishing the forgery of the letter was discovered after the judgments at law were rendered, and after the legal delays within which new trials could have been obtained, and could not have been discovered by her sooner:" Marshall v. Holmes, 141 U. S. 589.

Graver brought a bill in equity in the superior court of Cook County, Illinois, to compel Faurot to surrender notes alleged to have been fraudulently obtained, and did not waive a sworn answer. Faurot answered under oath, denying the fraud, and in July, 1889, a decree was rendered in his favor on the pleadings. In January, 1894, Graver filed in the same court another bill, charging the same fraud, averring newly discovered evidence to prove it, and praying that the first decree be annulled and Faurot be enjoined from setting it up as an adjudication of the matters therein determined. The gravamen of the new bill was "that it was solely by reason of the suppression of testimony on the part of said respondents, and by absolute falsehood and perjury on their part in the allegations contained in their respective answers, and their respective affidavits, that said bill was dismissed for want of equity, and that the complainant was not able to obtain competent evidence to establish the allegations of his said bill." The cause having been removed to the United States circuit court, Judge Jenkins found himself unable to decide it because of a supposed conflict between United States v. Throckmorton, 98 U. S. 61, and Marshall v. Holmes, 141 U. S. 589. He therefore sustained the demurrer pro forma, leaving the matter to be determined by the circuit court of appeals: Graver v. Faurot, 64 Fed. 241. That court found itself in the same dilemma, and certified the question to this court: 73 Fed. 1022. This court dismissed the certificate: 162 U. S. 435. Thereupon the case came on again in the circuit court of appeals, before Judges

Woods, Showalter, and Baker: 76 Fed. 257. The decree was then reversed, with a direction to overrule the demurrer. The court held that the false answers and the concealments thereby accomplished were a collateral fraud under the doctrine of the Throckmorton case. It drew what seems to us to be a useless and unfounded distinction between proceedings at law and those in equity, holding that the plaintiff in an equity suit has the right to search his adversary's conscience. Surely that right also exists in an action at law under modern statutes permitting parties to testify, especially when the adversary takes the witness stand in his own behalf. After quoting from the Marshall case the court said:

"If there is here any inconsistency with the opinion in United States v. Throckmorton, to which reference was made, it was not the result of oversight, and ought perhaps to be regarded as an intentional modification of the earlier utterance. But whether there is a conflict between the two opinions, or how they are to be reconciled, we need not consider. The present case, if we have properly interpreted the facts alleged, is distinguished from both, and rests upon an equity of which there can be no just denial. In reason and good conscience a decree obtained as this one is alleged to have been ought to be annulled. There can be no consideration of public policy or of private right on which it ought to stand. There can and ought to be no repose of society where for such wrongs the courts are incapable of giving redress."

Stowell v. Eldred, 26 Wis. 504, was a cross bill to enjoin a judgment at law. In the former action the authority of the plaintiff's agent was a material issue. Having no other evidence of it, the defendant put the plaintiff on the stand, and he falsely denied the agency. About four years after the judgment, the defendant discovered evidence establishing the agency. It was held that *the plaintiff's* perjury was sufficient ground for enjoining the judgment, and that the defendant's action in going to trial in reliance upon

the plaintiff's telling the truth was not such negligence as to bar his right to relief.

One Fraker insured his life for a large sum in different companies, made his will, went fishing at night in the Missouri River with several companions, fell into the river and disappeared, betook himself to the forests of Minnesota, and lived in concealment for some years. His companions having reported him drowned, his executor sued the companies at law on the policies, and in the United States circuit court at Kansas City secured the verdict of a jury that Fraker was dead. There, as in the case at bar, the issue was whether the insured was dead; and the evidence that he was so consisted of a chain of circumstances manufactured by himself for the purpose of being described by innocent witnesses, and causing it to appear that he was drowned. The court set aside the verdict and granted a new trial; whereupon a compromise judgment was entered and paid. The companies continued to search for Fraker, captured him, and filed in the same court their bills in equity to set aside the judgment and recover the money paid thereunder. Judge Phillips of that court sustained the bills, set aside the judgment, and ordered the money refunded. The cases were not reported. The action at law was a consolidated case against all the companies under the style of James E. Lincoln, Executor, v. Provident Savings Life Assurance Society et al. The proceedings in equity may be found under the style of Kansas Mutual Life Association v. James E. Lincoln, Executor. Fraker was prosecuted criminally, and many of the facts are recited in the opinion of the supreme court of Missouri in that case: State v. Fraker, 148 Mo. 143.

2.

THE BILL DOES NOT COME TOO LATE.

The bill was filed about three weeks after the discovery and identification of Hunter, and not quite a year after the payment of the judgment. The fact that the judgment had been affirmed and paid before Hunter was found, in no degree lessens the power of the court to grant appropriate relief.

2 Story's Equity Jurisprudence, §886; 1 High on Injunctions, §112; 3 Pomeroy's Equity Jurisprudence, §§1360 and 1364; Bispham's Principles of Equity, §407; Parker v. The Judges, 12 Wheaton 561; Stanton v. Embry, 93 U. S. 548, 46 Conn. 65 and 595, 107 U. S. 3; Trefz v. Knickerbocker Life Ins. Co., 6 Ins. L. J. 850, 104 U. S. 197, 8 Fed. 177; Streitwolf v. Streitwolf, 58 N. J. Eq. 563, 181 U. S. 179; Graver v. Faurot, 64 Fed. 241, 73 Fed. 1022, 162 U. S. 435, 76 Fed. 257; Young v. Sigler, 48 Fed. 182; Ocean Ins Co. v. Fields, 2 Story 59; Johnson v. Coleman, 23 Wis. 452; Furman v. Furman, 153 N. Y. 309; State of Michigan v. Phœnix Bank, 33 N. Y. 9.

The injunction may be granted at any stage of the proceedings at law. It acts purely in personam, restraining the holder from availing himself of his judgment when in good conscience he should not do so. There is no more reason why one who has collected money under a judgment wrongfully obtained should be permitted to use the judgment as a defense against an action for its return, than there is for allowing him to proceed in the first instance to collect it after discovery of the wrong. If collection of the money was against conscience, its retention is equally so; and no person should be suffered to use the judgment for the accomplishment of either wrong, as a weapon of offense or one of defense.

In Parker v. The Judges, 12 Wheaton 561, it was

held that the holder of a judgment affirmed by this court was not entitled to an execution thereon, because while the case was pending in this court an injunction had been obtained in the court below staying all proceedings thereunder. Chief Justice Marshall said: "The suit in chancery does not draw into question the judgment and proceedings at law, or claim a right to revise them. It sets up an equity independent of the judgment, which admits the validity of that judgment, but suggests reasons why the party who has obtained it ought not to avail himself of it. It proposes to try a question entirely new, which has not been, and could not be, litigated at law. It may be brought before the commencement of a suit at law, pending such suit, or after its decision by the highest law tribunal. ——— The condition of a suit at law may be a reason for imposing terms on the party who applies for an injunction, but can be no reason for refusing it."

The judgment attacked in Embry v. Palmer (Stanton v. Embry, above cited), 107 U. S. 3, had been affirmed by this court on writ of error before proceedings were begun in a court of the state of Connecticut to enjoin its use.

The judgment in the law case of Trefz v. Knickerbocker Life Ins. Co. was pending in this court on writ of error, when the circuit court overruled the demurrers to the defendant's bill to enjoin it for fraud and newly discovered evidence: 8 Fed. 177.

Streitwolf v. Streitwolf, 181 U. S. 179, was a bill to restrain the defendant in a divorce suit pending in New Jersey from setting up in defense a decree of divorce fraudulently procured by him in North Dakota. The injunction was granted by the chancery court and affirmed by the court of errors of New Jersey, and again affirmed by this court.

Graver v. Faurot, 76 Fed. 257, was a bill to set aside a decree, and particularly to enjoin the defendant "against setting up that decree as a final adjudi-

cation of the matters so determined." The demurrers were overruled.

Young v. Sigler, 48 Fed. 182, was a bill to set aside a judgment, cancel execution sales made thereunder, and compel an accounting for proceeds of property sold. The demurrers were overruled.

Ocean Insurance Co. v. Fields, 2 Story 59, was a bill filed in 1841 to set aside a judgment rendered in 1836 and duly paid, and to recover the money so paid. The demurrers were overruled.

In Johnson v. Coleman, 23 Wis. 452, a decree of divorce was set aside for fraud after the husband's death.

In Furman v. Furman, 153 N. Y. 309, the appeal was from an order entered in 1896 vacating a judgment rendered in 1877. The judgment was for partition of real estate among several heirs, one of whom was Minnie W. Furman, a minor. After the judgment determining the respective interests of the heirs was rendered and before sale was made under it, a motion was filed to set it aside for fraud of one of the parties; and it was set aside as to all of them except Minnie. In 1894, having grown up and married, she brought another suit for partition, claiming a one-fifth interest. It appears that her right was resisted upon the ground that she was not a legitimate child, and that she pleaded the judgment of 1877 as settling that question; so in 1896 a motion was filed to vacate the judgment. She resisted upon the ground that its vacation would deprive her of its use as an adjudication of her legitimacy, and that she was not a party to the fraud. The motion was granted and the order granting it was affirmed. This decides:—(1) that a judgment nineteen years old can be set aside for the sole purpose of preventing its use as an adjudication; and (2) that this can be done even though the person resisting was wholly innocent of the wrong infecting the judgment.

State of Michigan v. Phœnix Bank, 33 N. Y. 9, was a suit to recover money paid in obedience to a fraudulently procured judgment of a special tribunal. The amount involved was large; the question was interesting and important; the counsel were of great learning, Charles O'Conor appearing for the defendant; and the decision was made by a unanimous court after full consideration. The question as stated by the court was: "Whether money received by one party from another, by means of a judgment or other judicial proceeding which was obtained through the fraud, falsehood and imposition of the party obtaining it, upon the tribunal by which it was adjudged, and where the money so obtained was paid before the discovery of the fraud by the party paying it, can be recovered back by the party from whom through such means it was obtained." It was held that the plaintiff was entitled to recover, the court saying: "If a court of equity was limited in its power to grant relief by its decree, to nullify or declare void only such judgments or other securities obtained by fraud, as had not been carried into effect, it would fail in one of its most valuable attributes."

3.

THE SITUATION DEMANDS EQUITABLE RELIEF.

If one person gets possession of another's money by fraud, the law raises a promise to return it, and upon such implied promise an action may be maintained.

Bishop on Contracts, §226; Moses v. Macferlan, 2 Burrow 1005; Buller v. Harrison, 2 Cowper 565; Northwestern Mut. Life Ins. Co. v. Elliott, 5 Fed. 225; National Life Ins. Co. v. Minch, 53 N. Y. 144; Gaines v. Miller, 111 U. S. 395; Merryfield v. Wilson, 14 Tex. 224; State of Michigan v. Phœnix Bank, 33 N. Y. 9.

The fraud in this case consisted in obtaining by wrongful means a judgment that William A. Hunter had died, thereby rendering the plaintiff liable to Mrs. Smythe. Whether he had so died was the question directly in issue in the action at law, and the verdict and judgment therein are conclusive between the parties and privies, save upon such direct or collateral attack as may be permissible under the circumstances.

Bigelow on Estoppel, 90; Outram v. Morewood, 3 East 346; Hazen v. Reed, 30 Mich. 331; Monks v. McGrady, 71 Tex. 134; McGrady v. Monks, 20 S. W. 959.

The federal courts and the courts of all the states in which the various defendants reside agree in holding that a judgment cannot be collaterally attacked for fraud.

Christmas v. Russell, 5 Wallace 290; Peninsular Iron Co. v. Eells, 68 Fed. 24; K. C., Ft. S. & M. R. Co. v. Morgan, 76 Fed. 429; Commissioners of Lake County v. Platt, 79 Fed. 567; Maddox v. Summerlin, 92 Tex. 483; Anderson v. Anderson, 8 Ohio 109; State v. Ross, 118 Mo. 23.

Moreover, the federal decisions probably are controlling in this matter, as the judgment was rendered by a federal court: Embry v. Palmer, 107 U. S. 3.

The defendants Clark, Culberson, Spoonts and Phillips Investment Company are all privies to the judgment by assignment of interests in its subject matter, and are protected by it to the same extent as Mrs. Smythe.

Bigelow on Estoppel, 142-149; 2 Black on Judgments, §§549-550; Commissioners of Lake Co. v. Platt, 79 Fed. 567; Porter v. Bagby, 50 Kan. 412.

Therefore as to all the defendants equitable relief is necessary and proper in the case, if the facts are sufficient to warrant interfering with the judgment.

4.

EXTENT OF RELIEF.

It is the general course of chancery to proceed to grant full relief when once it has obtained jurisdiction of a controversy. This it does mainly for the purpose of avoiding a multiplicity of suits. Therefore in the present case, having jurisdiction to restrain the defendants from setting up the judgment as an adjudication, the court should not turn the plaintiff over to sundry law courts in Texas, Ohio and Missouri for the recovery of its money, but, if otherwise proper, itself should administer full relief by ordering the return of the money.

1 Story's Equity Jurisprudence, §§64K-71 and 456-457; 2 idem, §885; 1 Pomeroy's Equity Jurisprudence, §§181, 231 and 236; 2 idem, §910; Roy v. Duke of Beaufort, 2 Atkyns 190; Rickle v. Dow, 39 Mich. 91; Young v. Sigler, 48 Fed. 182; Ocean Insurance Co. v. Fields, 2 Story 59; State of Michigan v. Phœnix Bank, 33 N. Y. 9.

5.

BILL NOT MULTIFARIOUS.

In Gaines v. Chew, 2 Howard 619, this court sustained a bill brought to set aside the probating of a will fraudulently procured by the executors, and to recover from the executors and all purchasers under the will the property held by them. That case seems to us decisive of the contention that the present bill is multifarious.

LIABILITY OF THE APPELLEES.

1.

THE FACTS.

On October 27, 1897, Mrs. Mettler employed the firm of Alexander, Clark & Hall to institute and prosecute against the insurance company her suit up-

on the policies issued by it on the life of Hunter, "for a contingent fee of one-third of the amount recovered upon said policies." The contract contained a clause as follows: "It is understood and agreed that for and in consideration of the legal services rendered, and to be rendered, by the said Alexander, Clark & Hall, this instrument conveys to the said Alexander, Clark & Hall an undivided one-third interest in said policies" (Tr., 202-203). These negotiations were had with Mr. Clark, the appellee, a member of the firm (Tr., 345). He was informed at that time that the insurance company denied that Hunter was dead; and he knew during the entire progress of the litigation that this was its position (Tr., 354). On June 10, 1899, a new and substitute contract was made (Tr., 200-201). In this contract it was recited that the labor involved in the collection of the money was greater than had been anticipated, "the insurance company claiming: 1. That the proofs of death furnished did not and do not reasonably show death; ——— 3. That W. A. Hunter is not dead." After the preliminary recitals, the instrument proceeded as follows:

"Now, therefore, this agreement, or power of attorney, executed in lieu of and in substitution of said original power of attorney, in consideration of the facts above stated, witnesseth: That I, Jennie M. Mettler, the present owner of said policies, hereby ratify my employment of said attorneys, and do now employ them, the said Alexander, Clark & Thompson and W. L. Hall; and it is understood and agreed that the said Alexander, Clark & Thompson and W. L. Hall, will continue to prosecute said suit, as in their judgment they may deem proper, and in consideration of the legal services rendered, and to be rendered in the collection of said policies, by suit or otherwise, they are to receive and are hereby given, transferred, assigned and delivered one-third interest of, in and to said policies and claim against said life insurance association, and the further sum of $2500.00

thereof, that is, should the principal, accrued interest and 12 per cent. statutory damages, if allowed, amount to $18,000.00 and be collected, they would own and should receive $8500.00 thereof; as well as the attorneys' fees provided for by the statutes of Texas in such cases; and should a less amount on account of principal, interest and said 12 per cent. damages be collected by suit or compromise, they would own and should receive their pro rata part thereof, according to their interest aforesaid, as well as said attorneys' fees, if any, collected; it being understood that on account of the decision in G. C. & S. F. Railway Company vs. Ellis, 165 U. S. 150, it is very probable that a recovery of the ten per cent. attorneys' fees, as well as of the 12 per cent. damages, cannot be enforced. It is further understood and agreed that if said suit is compromised, it must be with the consent of said Mrs. Jennie M. Mettler and of Alexander, Clark & Thompson and W. L. Hall. It is further understood that the said Alexander, Clark & Thompson and W. L. Hall, may employ such associate attorneys to aid them in the prosecution of said suit as they may deem necessary, it being agreed that they are to pay such attorneys themselves, and the said Mrs. Mettler is not to be liable for attorneys' fees other than provided for above."

The policies were delivered to Alexander, Clark & Hall at the time of the original negotiation (Tr., 345). About January 1, 1898, Mr. Hall retired from the firm of Alexander, Clark & Hall, retaining his one-third of the firm's interest in the case. The remaining portion passed to the new firm of Alexander, Clark & Thompson. In 1899 that firm was dissolved, and in the partition of its business the Mettler case was taken by Mr. Clark, who also bought out Mr. Hall. This all occurred before the affirmance of the judgment by this court. Afterwards, on May 29, 1902, Messrs. Alexander, Thompson and Hall made formal assignments to Mr. Clark of their interests in the two contracts and the judgment (Tr., 346-347, 201 and 203). Both the contracts, with the assignments to Mr. Clark endorsed thereon, were filed with the

clerk of the circuit court June 3, 1902 (Tr., 202 and 203).

In 1899, Mr. Spoonts, one of the appellees, was employed by Mr. Clark to assist in the prosecution of the suit (Tr., 339). No contract was made at that time with reference to the fee of Mr. Spoonts, Mr. Clark simply stating that he would make the matter satisfactory. After the affirmance of the judgment by this court, they agreed upon a fee of $1,500, and Mr. Clark gave Mr. Spoonts an order for $1,500 payable out of the insurance money when collected. Mr. Spoonts left this order with the clerk. This was some time in the early part of May, 1902 (Tr., 341, 342-343). Afterwards Mr. Clark wrote Mr. Spoonts the following letter:

"Dallas, Texas, May 26, 1902.

Hon. M. A. Spoonts,
Ft. Worth, Texas.

My dear Spoonts: The Mettler judgment will be paid off in a few days. It will be paid to the clerk & I will have him send you a check for your part of the recovery, to-wit: fifteen hundred dollars ($1,500.00). Your friend,

W. H. Clark."

Mr. Spoonts sent this letter to the clerk, with one of his own, reading as follows:

"Mr. J. H. Finks,
Clerk U. S. Court,
Dallas, Texas.

Dear Sir: The def't's attorneys in case of Jennie M. Mettler vs. Fidelity Mutual Life Insurance Ass'n inform me that the amount of judgment will be paid into court within a few days. I have an interest of $1,500.00 in said judgment, which please remit to me at Fort Worth as soon as the money is paid over to you. Attached is a letter from W. H. Clark, which explains itself. Yours t'ly,

M. A. Spoonts."

These letters were filed by the clerk June 1, 1902 (Tr., 341 and 203-204). At the time of undertaking

to assist in the prosecution of the case, Mr. Spoonts knew that the insurance company denied that Hunter was dead (Tr., 342).

On December 30, 1901, while the case was pending in this court on writ of error, Senator Culberson, one of the appellees, was employed by Mr. Clark and Mrs. Mettler to defend the judgment here. He knew at that time that the insurance company denied that Hunter was dead (Tr., 354). His contract was in writing, and after some preliminary recitals proceeded as follows:

"Premises considered, we, the said Jennie M. Mettler, a femme sole, and W. H. Clark, her attorney, the owners of said judgment, hereby employ Chas. A. Culberson of Dallas, Texas, now temporarily residing in Washington, D. C., to brief said case for and in behalf of the said Mrs. Jennie M. Mettler, defendant in error, and to orally argue said case for her on the submission thereof in the supreme court; and for and in consideration of such services rendered and to be rendered by him, we hereby give, transfer and assign to him, said Chas. A. Culberson an interest of one thousand ($1,000.00) dollars in and to said judgment, and also the cause of action, that is, policies of life insurance sued upon. It is understood that payment of said fee is contingent upon a recovery upon said policies. It is further understood that five hundred dollars of said one thousand dollars is to be paid out of the interest of said Mrs. Jennie M. Mettler in said suit, and that the remaining five hundred dollars is to be paid out of the interest of said W. H. Clark therein, and that the one is not to be responsible for the portion to be paid by the other; that is, each one undertakes to pay said Chas. A. Culberson five hundred dollars, as aforesaid."

This instrument was signed by Mrs. Mettler both personally and through her attorney, and by Mr. Clark (Tr., 70-71). It does not appear ever to have been filed with the clerk. The following letter from Senator Culberson to Mr. C. A. Rasbury was deposited with the clerk (Tr., 193 and 203):

"United States Senate,
Washington, D. C., May 8, 1902.

Mr. C. A. Rasbury,
Dallas, Texas.

Dear Rasbury: The insurance case against the Fidelity Mutual Life Association about which I wrote you some time ago, was affirmed on Monday, and in accordance with my agreement with Clark, my fee is $1,000 and is due when the judgment is paid. As I have heretofore written you, I will be glad if you will do me the kindness to collect this $1,000 for me, as Clark wires me to-day that the judgment will be paid in Dallas. He also owes me $26 for printing briefs, which please collect also and deposit the whole sum in the National Exchange Bank of Dallas to my credit, and notify me when it is done.

Very truly yours,
C. A. CULBERSON."

Mr. Clark instructed the clerk to pay Senator Culberson $1,026 and deduct it from the amount that should be paid to him (Tr., 193).

In 1901, Mr. Clark owed the appellee Phillips Investment Company $6,721.57, secured by a mortgage on real estate. The company desired a settlement of the debt, and he conveyed the mortgaged property to it for a credit of $5,250 on the debt; and under date of October 29, 1901, he gave them his note for the remaining sum of $1,471.57, due March 1, 1902, and secured by an assignment of his interest in the Mettler case (Tr., 349 and 197-198). The granting clause of said assignment read as follows:

"Now therefore, in consideration of the said Phillips Investment Company's having accepted a deed from him to said property in satisfaction of said principal indebtedness, and taken his promissory note for said sum of $1,471.57, as agreed and understood to secure the payment of said note of $1,471.57, I, the said W. H. Clark, do hereby assign, transfer, grant, sell and confirm unto the said Phillips Investment Company, all of my right, title and interest; that is, my contingent attorney's fees of about

$8,000.00 in the cause of action and judgment of $21,550.00 rendered thereon on the 4th day of July, A. D. 1900, in the United States Circuit Court for the Northern District of Texas, at Dallas, in the life insurance case of Jennie M. Mettler vs. Fidelity Mutual Life Association of Philadelphia, numbered 2118; said judgment rendered as aforesaid in favor of Mrs. Jennie M. Mettler, and against said association, from which judgment a writ of error is now pending in the Supreme Court of the United States" (Tr., 297).

This assignment was filed with the clerk of the circuit court December 2, 1901. The settlement was negotiated between Mr. Clark and Mr. Young, a representative of the investment company. Mr. Clark's recollection is that he did not go into details with Mr. Young in regard to the nature of the litigation. The assignment was written on the stationery of Alexander & Thompson, successors to the firm of Alexander, Clark & Thompson; and the acknowledgment of Mr. Clark to it was taken by W. H. Mansfield, who was Alexander & Thompson's stenographer. Mr. Alexander's recollection is that he did not advise with Mr. Young in regard to the settlement, but was merely informed by Mr. Young that a settlement had been made. It is thought by Mr. Clark and Mr. Alexander that Mr. Young dictated the assignment himself to Mr. Mansfield (Tr., 354-355 and 358-359).

In all that they did relative to the prosecution of Mrs. Mettler's suit against the insurance company and in accepting compensation therefor, Messrs. Clark, Spoonts and Culberson were acting in entire good faith, believing that Hunter was dead, and that their client had a legitimate cause of action. The appellant never has alleged or attempted to prove anything to the contrary of this.

On May 29, 1902, the appellant issued its check for $24,028.25, payable "to the order of J. H. Finks, clerk of the United States Circuit Court, Dallas, in

full of judgment in the case of Mettler v. Fidelity Mutual Life Association, with interest thereon to June 4, 1902" (Tr., 268 and 185). This check was sent by the insurance company to its attorneys in Dallas, and by them was delivered to the clerk of the circuit court in settlement of the principal and interest of the judgment. The clerk endorsed it and deposited it to the credit of the United States Circuit Court, at Dallas, in the American National Bank of Dallas, which was a United States depository (Tr., 185, 190 and 206-207). At the close of business on June 2, 1902, the amount standing to the credit of the court in the bank was $912.68. On June 3rd, a deposit of $24,028.25 was made, consisting of the check received by the clerk from the insurance company. The bank had only one account with the circuit court at Dallas, not maintaining a separate account for each fund deposited in the registry of the court. On the books of the clerk this fund was carried as a separate fund (Tr.,190, 206 and 211-212). The bank credited the amount to the court in its account, and collected the check through its Philadelphia correspondent (Tr., 206).

On the same day that he received the check the clerk distributed the entire fund by giving to the distributees checks of the court on the bank as follows:

Check No. 424, in favor of Phillips Investment Company,	$1,540.25
Check No. 425, in favor of M. A. Spoonts, ...	1,500.00
Check No. 426, in favor of C. A. Culberson, ...	1,026.00
Check No. 427, in favor of "W.H.Clark, Attorney, to the use of himself", ...	8,346.00
Check No. 428, in favor of "W. H. Clark, att'y of record for Mrs. Jennie M. Mettler, to the use of Jennie M. Mettler",	11,616.00
Total, ...	$24,028.25

Mutatis mutandis, these checks were all alike in form, No. 428 reading as follows (Tr., 191 and 213-216).

"Registry Voucher No.——, Check No. 428.

In the Circuit Court of the United States of America, at Dallas, Texas.

Dallas, Texas, June 3, A.D. 1902.

In cause No. 2118 of Jennie M. Mettler, plaintiff, against Fidelity Mutual Life Association of Philadelphia, defendant.

To American National Bank of Dallas:

Pay to the order of W. H. Clark, att'y of record for Mrs. Jennie M. Mettler, to the use of Jennie M. Mettler, on account of judgment, the sum of eleven thousand six hundred sixteen dollars, out of the fund deposited in said cause.

Charge the same to the account of the United States circuit court at Dallas, Texas.

$11,616.00. J. H. FINKS,
Clerk of said Court,

(Countersigned) By_____, Deputy.
EDWARD R. MEEK,
Judge of said court."

For each of the payments so made by him, the clerk received a voucher. Mutatis mutandis, these vouchers were alike, the one from Senator Culberson being signed in his name by C. A. Rasbury, and the one from Phillips Investment Company being signed in its name by Alexander & Thompson. Mr. Clark's voucher read as follows:

"J. H. Finks, Clerk United States Courts,
Northern District of Texas.

No. 1529. Dallas, Texas, June 3, 1902.

Received of J. H. Finks, clerk, $8346.00—the sum of eight thousand three hundred forty-six /100 dollars, on account of judgment in case of Jennie M. Mettler vs. Fidelity Mutual Life Ass'n of Philadelphia, No. 2118.

W. H. CLARK" (Tr., 191 and 204-205).

The checks drawn by the clerk were all duly paid, as follows. Check No. 424 was endorsed by Phillips Investment Company to the Bank of Montreal at Chicago, by it endorsed and sent to the Fourth Street National Bank of Philadelphia, and by it endorsed and sent to the City National Bank of Dallas, to which bank it was paid through the clearing house June 16, 1902. Check No. 425 was deposited by Mr. Spoonts for his credit in the Ft. Worth National Bank of Ft. Worth, which sent it to the American National Bank of Dallas for credit of its account. It was so credited June 6, 1902. Check No. 426 was deposited by Senator Culberson in the National Exchange Bank of Dallas, and was paid to it through the clearing house June 12, 1902. Checks No. 427 and No. 428 were paid on June 4, 1902, to W. H. Clark. He seems to have taken for them cashier's checks amounting to $19,616, and $346 in money (Tr., 207, 208, 213-216 and 342).

Upon an adjustment of their accounts Mr. Clark remitted to Mrs. Mettler $11,160.50, as being the amount due her (Tr., 350). The money realized by Mr. Clark and Mr. Spoonts was paid out by them in the regular course of their business, and they had none of it on hand at the time of the institution of this suit (Tr., 349 and 344). There was no evidence as to the disposition made by Senator Culberson and Phillips Investment Company of the sums paid them.

When Alexander & Thompson received from the clerk the check in favor of Phillips Investment Company, they surrendered to the clerk Mr. Clark's note to the company, receipted by them in full, and the same was kept by the clerk as a part of his files (Tr., 198 and 359).

2.

GENERAL PRINCIPLES.

When property has been obtained by fraud, its true owner may recover it from any person except a bona fide purchaser for value, without notice. The authorities on this subject are numerous, and are believed to be unanimous in support of the proposition.

Buller v. Harrison. 2 Cowper 565; Thurston v. Blanchard, 22 Pickering 18; Devoe v. Brandt, 53 N. Y. 462.

The exception relates only to those kinds of property whose purchasers for value are protected by the policy of the law from equities outstanding against their vendors of which they had no notice. Such are money, negotiable paper, land and merchantable chattels, naming them in a descending scale of negotiability. A judgment is not such property. The policy of the law is to protect litigants, not outsiders dealing with judgments. The assignee of a judgment takes it subject to all equities existing between the litigants, whether he had notice of the same or not, and regardless of the consideration paid therefor.

2 Black on Judgments, §§953 and 955; 1 High on Injunctions, §190; Taylor v. Nash. & Chat. R. Co., 86 Tenn. 228; Blakesley v. Johnson, 13 Wis. 592; Ind. School Dist. of Rock Rapids v. Schreiner, 46 Iowa 172; Rea v. Forrest, 88 Ill. 275; Northam v. Gordon, 23 Cal. 255; Weber v. Tschetter, 1 S. D. 205; Ellis v. Kerr, Tex. Civ. App., 23 S. W. 1050 and 32 S. W. 444; Wright v. Treadwell, 14 Tex. 255; Minn. Thresher Mfg. Co. v. Holz, 10 N. D. 16; Brisbin v. Newhall, 5 Minn. 273; McJilton v. Love, 13 Ill. 486; Wright v. Levy, 12 Cal. 257; Jeffries v. Evans, 6 B. Monroe 119; Devoll v. Scales, 49 Me. 320; Padfield v. Green, 85 Ill. 529; Mulford v. Stratton, 41 N. J. Law 466; Magin v. Pitts, 43 Minn. 80;

Fred Miller Brewing Co. v. Hansen, 104 Iowa 307; Ricaud v. Alderman & Flanner, 132 N. C. 62; Frankel v. Garrard, 160 Ind. 209.

We know of no conflict of authority on this subject. Mr. Black in the sections first above cited sums up the situation as follows:

"The assignee of a judgment takes it subject to all the equities subsisting between the original parties, whether he had notice of the same or not; he can occupy no better position, and acquire no firmer rights, than his assignor possessed. ——— The assignee of a judgment stands in no better position than the original plaintiff, and the judgment may be reversed, vacated, set aside, or enjoined in the assignee's hands for the same reasons which would justify such action if it remained in the hands of the plaintiff. And when proceedings are instituted for any of these purposes, the assignor is not a proper or necessary party, as he has no longer an interest in the judgment. Upon the reversal of the judgment, the assignee, if he has purchased property under his own execution, will lose his title thereto. So if he has acquired rights under the judgment, and it is subsequently reversed, he must make restitution, the same as if he were an original party."

The supreme court of Iowa said in the case of School District v. Schreiner above cited:

"The defendants, Nathan Schreiner & Co., are shown to be innocent purchasers of the judgment for value, without knowledge of the frauds perpetrated by Van Sickel and others, in obtaining the warrants and procuring the judgment. But they hold it as assignees subject to all equities or defenses that could have been asserted against it while in the hands of the plaintiff, Van Sickel. Although these parties are innocent holders, the law will not, for their protection, enforce the fraudulent judgment. They stand in the same position of honest purchasers of stolen property; their rights are not superior to those of the plaintiffs, who the conspirators intended should become the victims of their frauds."

A policy of insurance is not a negotiable instrument, and the purchaser of it takes it subject to all equities: 1 May on Insurance, §386; 3 Joyce on Insurance, §2326. The same is true of an order drawn against a specific fund therein named: 7 Cyc. 578. Nor do we see how it can be contended that a fund of money deposited in the registry of a court, or which it is expected will be so deposited, possesses any of the elements of negotiability. The assignee of an interest in such a fund, it seems to us, takes only the title which the assignor had.

An order drawn against a particular fund constitutes an equitable assignment thereof pro tanto; and if such be the intention of the parties, it will be so held, even though the order be general in its form. The fund so assigned need not be actually in existence at the time of the giving of the order, provided it is to come into existence as the result of arrangements already made.

3 Pomeroy's Equity Jurisprudence, §§1280-1284; Fourth St. Nat. Bank v. Yardley, 165 U. S. 634; Brill v. Tuttle, 81 N. Y. 454.

3.

APPELLEES HOLD UNDER ASSIGNMENTS.

It appears to be the theory of the appellees that the assignments can be ignored, and the case be dealt with as if the fact were that Mrs. Mettler collected the amount of the judgment obtained by her against the insurance company, and then paid to her attorneys the fees owing by her to them for their professional services. We do not see how such a position as this can be maintained. As a matter of fact no portion of the avails of the judgment ever passed through Mrs. Mettler's hands, save the net sum of $11,160.50, sent to her by Mr. Clark. Each of the appellees received his part of the fund directly from

the court, in the form of a non-negotiable order in his own favor, drawn on the United States depository in which the fund was deposited, and payable out of that specific fund. The clerk and the judge, who respectively signed and countersigned the orders, were in no sense the agents of Mrs. Mettler. They were acting only in their official capacity, receiving and holding the fund in the name of the court, and distributing it among its apparent owners.

MR. CLARK'S POSITION.

While the suit was pending in the circuit court a new contract was made between Mrs. Mettler and Mr. Clark's firm, which by its terms became a substitute for the original contract. By this instrument it was provided that Mr. Clark and his partners should continue to prosecute the suit; and thereby, in consideration of their services rendered and to be rendered, Mrs. Mettler assigned, transferred and delivered to them a determinate interest, amounting to somewhat more than one-half, "in said policies and claim against said life insurance association." There was not anywhere within the four corners of the paper a promise upon the part of Mrs. Mettler to pay any sum whatsoever as a fee, either fixed or contingent. There was simply an assignment in the present tense of an interest in the policies and the claim against the insurance company, made in consideration of services rendered and to be rendered. And lest there might be implied an obligation upon the part of Mrs. Mettler to pay in some other way for services rendered or to be rendered by Mr. Clark and his partners, or by other attorneys who should be employed to assist them, it was expressly stipulated that if they should employ other attorneys they themselves should pay for their services, and that Mrs. Mettler should not be liable for any attorney's fees otherwise than as provided for by the assignment. This instrument

surely exempted Mrs. Mettler from any personal responsibility to Mr. Clark and his associates for fees, and it surely constituted Mr. Clark and his associates co-owners with Mrs. Mettler of the claim against the insurance company upon the Hunter policies. By taking a transfer they obtained the rights incident to ownership, and they could not have the rights without the attendant responsibilities. They had not yet paid the full consideration, though in due time they did so. But, as soon as made, the assignment was an executed conveyance, which could not be set aside except for fraud or mistake. If the attorneys had failed to render the services promised, Mrs. Mettler would have had a cause of action against them for damages for their breach of contract. They could not have limited their liability to the loss of their interest in the policies; nor could she have avoided the conveyance. The validity of the instrument was not at all dependent upon its being filed or recorded. If Mrs. Mettler had made a subsequent assignment, it would not have affected their rights. If the insurance company had settled with her, it could have protected itself only by showing that it had made the settlement in ignorance of their interest; and the policies were in their possession. Of course the assignment was subject to the equities of the insurance company, because the property conveyed (life insurance policies and a claim based thereon), possessing none of the peculiar attributes of negotiable instruments, could not be transferred in any other way. Probably Mr. Clark has now a cause of action against Mrs. Smythe (Mettler) for the reasonable value of his services, upon the ground that she deceived him into rendering them in exchange for an interest in a worthless and fraudulent claim. When the fund was about to be distributed, Mr. Clark chose to file his assignment with the clerk, and to receive his part of the proceeds of the litigation directly and in his own

right, rather than to receive the entire amount as Mrs. Mettler's attorney of record and in her right, and to make his own adjustments with her thereafter. Doubtless one reason for his choice was the fact that he had transferred to Mr. Spoonts and to Phillips Investment Company portions of his share of the fund, by written instruments which they had filed in court; and his own assignment was a necessary part of their chains of title, without which the clerk could not make payment to them. The facts, it seems to us, are entirely incapable of bearing any construction other than that the sum of $8,346, represented by check No. 427, was paid to Mr. Clark as a part owner of the fund. It was not paid to him as the attorney of Mrs. Mettler, or as compensation for his services. He had received his compensation long before in the form of a transferred interest in the cause of action, and had been able to use it as collateral security for his debt.

SENATOR CULBERSON'S POSITION.

The position of Senator Culberson does not appear to differ in any way from that of Mr. Clark. While the suit was pending in this court, the judgment of the circuit court having been suspended by a supersedeas bond, Senator Culberson was employed by Mrs. Mettler and Mr. Clark, claiming to be "the owners of said judgment," to defend the same in this court. In consideration of the services rendered and to be rendered by him, there was assigned to him by Mrs. Mettler and Mr. Clark "an interest of one thousand ($1,000.00) dollars in and to said judgment, and also the cause of action, that is, policies of life insurance sued upon." It was stipulated that the payment of said fee should be contingent on a recovery upon said policies. And it was specified that $500 of the amount should be paid out of Mrs. Mettler's interest in the suit and $500 out of Mr.

Clark's interest; and that neither should be responsible for the portion to be paid by the other. It seems to us that this paper can not be construed otherwise than as an assignment by Mrs. Mettler of an interest of $500 in her share of the cause of action and of the judgment, and by Mr. Clark of an interest of $500 in his share thereof, in consideration of Senator Culberson's agreement to render his professional services in this court. The inference that there was to be any liability on the part of either Mrs. Mettler or Mr. Clark to pay for these services in any way other than by the transfer so made is excluded by the terms of the agreement. If payment had been made to Mrs. Mettler or to Mr. Clark of the amount belonging to Senator Culberson, and the one receiving it had failed to turn over the proceeds, his right of action would have been not for services rendered, but for money had and received. He was a co-owner with Mrs. Mettler and Mr. Clark of the insurance policies and the judgment based thereon from and after December 30, 1901; and $1,000 of the $1,026 paid to him was paid to him as such.

POSITION OF PHILLIPS INVESTMENT COMPANY.

The nature of the rights of Phillips Investment Company in the fund can not be distinguished from that of the rights of Mr. Clark and Senator Culberson. While the suit was pending in this court, Mr. Clark assigned to the investment company, as security for a debt, all of his interest in the litigation, the language of the granting clause being as follows: "I, the said W. H. Clark, do hereby assign, transfer, grant, sell and confirm unto the said Phillips Investment Company, all of my right, title and interest; that is, my contingent attorney's fees of about $8,000.00 in the cause of action and judgment of $21,550.00 rendered thereon on the 4th day of July, A. D. 1900, in the United States Circuit Court for

the Northern District of Texas, at Dallas, in the life insurance case of Jennie M. Mettler v. Fidelity Mutual Life Association, of Philadelphia, numbered 2118." This document transferred to the investment company as security all of the interest which Mr. Clark had "in the cause of action and judgment." Like Senator Culberson, the investment company seems to have thought it advisable to obtain an interest in the cause of action itself, for the quite sufficient reason that the judgment had not yet become a finality but was subject to reversal on the writ of error then pending. The assignment was made in the fall of 1901, as collateral security for about $1,500 of unpaid interest and taxes accrued on an old mortgage, the mortgaged property having been taken by the company in satisfaction of the principal (Tr., 197). It was filed soon afterwards among the papers of the cause, so as to affect with notice the insurance company and all others concerned. Since the assignment was not made absolutely but only as collateral security for a debt, it was necessary that the clerk should be given evidence of the continued existence of the debt and of its amount before he could make any payment thereunder. And it is a notable fact that when the clerk gave his check on the government depository to the attorneys of the investment company they receipted the note, but instead of surrendering it to Mr. Clark, as his voucher for a payment made by him, they surrendered it to the clerk of the court as his voucher for a disbursement made in his official capacity to the owners of a fund in his hands. This was no new transaction; it was merely the recognition of existing rights in exact accordance with the terms of the instrument creating them. It was not the present payment by Mr. Clark of his debt, but was the application to the discharge of that debt of a security long before assigned by him. Could Mr. Clark have

ignored this assignment? Could the clerk have done so after it had been filed with him? Could the insurance company have done so? Certainly not. Then with what show of reason can the investment company now claim that the assignment was a mere incident, affecting nothing? Mr. Clark's interest in the cause of action and judgment was subject to the plaintiff's equities, and he could convey to the investment company nothing more than he himself had. Nor is the investment company hurt by this view of the matter. It gave nothing for its transfer of the judgment except an extension of about four months of time for the payment of an old debt which Mr. Clark was unable to pay or otherwise to secure. Mr. Clark testifies that he does not think the assignment of the judgment even had any effect in procuring this extension (Tr., 355). Now that the supposed payment out of the collateral is found to have been in fact no payment, the discharge of the debt is avoided and the note remains a subsisting demand against Mr. Clark, who, so far as the evidence shows, is as well able to pay it now as he ever was. True, but for the assignment, he might have reduced his share of the judgment to money and have paid the note voluntarily in cash. This, in a sense, would have been payment with the insurance company's money, but the company could not have recovered it, because money passes from hand to hand unaffected by outstanding equities. But, if the investment company wanted that kind of protection, it should have left Mr. Clark free to collect his own credits and pay his own debts in the usual course of business. That was not what it desired. Mr. Clark had other debts (Tr., 349), and it wished to be protected against his possible failure to pay this one out of the money to be realized on the judgment. There was no way for it to obtain both advantages at the same time; and having made its election it must abide the consequences.

THE POSITION OF MR. SPOONTS.

In form the derivation of Mr. Spoonts's right to a share of the fund differs from that of the other appellees, but in legal effect we think it the same. Mr. Spoonts rendered professional services in the litigation at the request of Mr. Clark, and thus there arose an obligation upon the part of Mr. Clark to pay him the reasonable value of those services. After the judgment of the circuit court had been affirmed by this court, but before the insurance company had drawn its check in favor of the clerk for the discharge of the judgment, Mr. Clark and Mr. Spoonts agreed that the fee of the latter should be $1,500; and at the same time Mr. Clark gave Mr. Spoonts a written order on the clerk for $1,500, payable out of the proceeds of the judgment when received. Mr. Spoonts deposited this order with the clerk. For some reason the original paper was not introduced in evidence, and the only information we have as to its terms is the description given of it by Mr. Spoonts himself. He testifies that the order was "just a memorandum, telling the clerk to pay me $1,500 out of the fund when collected." And again he testifies that the understanding between him and Mr. Clark was that the order was not a general draft against any credit which Mr. Clark might have, but it was drawn against the money to be collected on the Mettler judgment (Tr., 341 and 343). The fund was not yet in existence, but it did come into existence within a month as a result of a judgment already obtained and affirmed by this court. The order constituted an equitable assignment of an interest of $1,500 in the embryonic fund. Probably also it operated as an assignment of a like interest in the judgment itself, out of which the fund was to arise (Fairbanks v. Sargent, 104 N. Y. 108; Holmes v. Evans, 129 N. Y. 233; Milmo Nat. Bank v. Convery, 8 Tex. Civ. App. 181). To illustrate, if thereafter

and before the check of the insurance company reached the clerk, Mr. Clark had made an assignment of his entire interest in the judgment, doubtless Mr. Spoonts could have held his $1,500 claim against the subsequent assignee. Both Mr. Clark and Mr. Spoonts appear to have taken this view of the matter. On May 26th, which was before the company made its remittance, Mr. Clark wrote to Mr. Spoonts: "The Mettler judgment will be paid off in a few days. It will be paid to the clerk & I will have him send you a check for *your part of the recovery to-wit: fifteen hundred dollars.*" Before the check was received by the clerk, Mr. Spoonts wrote him, saying: "*I have an interest of $1,500 in said judgment* which please remit to me at Fort Worth as soon as the money is paid over to you." If it be not true that what was done amounted to an assignment of an interest in the judgment itself, it certainly is true that it amounted to an assignment of an interest in the fund, and a settlement of the debt thereby. Mr. Spoonts may have a cause of action against Mr. Clark now, based upon his implied warranty that such a fund would come into existence, and that he had the unconditional right to dispose of it. But for the time being Mr. Clark's debt to Mr. Spoonts was fully settled by the order on the clerk, and Mr. Spoonts could not have maintained an action thereon. What has been said about the investment company's unwillingness to wait and let Mr. Clark pay his debt after collecting the judgment applies equally to Mr. Spoonts. Having enjoyed the benefit of the assignment and required Mr. Clark and the clerk to deal with him as a co-owner of the fund, it is too late for him in this litigation to change his attitude and assume the position of one to whom money was paid out of the proceeds of the judgment after the same had been realized upon by some one else.

The court will not have failed to observe, that Mr. Spoonts gave no new consideration for his assignment of an interest in the fund. He received it in satisfaction of an existing debt. So far as we are aware, antecedent indebtedness is held everywhere to be a valuable consideration for money. In the federal court, (since Swift v. Tyson, 16 Peters 1), and in Texas (since Greneaux v. Wheeler, 6 Texas 515), and probably in most, but not in all, other jurisdictions, it is held to be a valuable consideration for negotiable paper. In Texas (since Spurlock v. Sullivan, 36 Texas 511), and generally elsewhere, it is held not to be a very valuable consideration in land transactions. As we descend the scale of negotiability, and come to deal with things which in the ordinary course of business are not used for the settlement of debts, the requirement that new value must be given to support a claim of bona fide purchase becomes more strict. We think, therefore, that Mr. Spoont's position lacks equity in this particular also.

RESUME.

By her contracts Mrs. Mettler had secured exemption from personal liability for fees, and required her attorneys to rely wholly upon the cause of action for their compensation, transferring to them definite shares thereof. Therefore she owed them no duty save that of not misappropriating their part of the proceeds. She did not authorize the clerk to pay in her behalf any debts she might owe for fees or for anything else. He had no correspondence with her, and received no communication of any kind from her. So far as the evidence shows, she had no information as to the method by which the insurance company would satisfy the judgment. The company's check was payable to the clerk in his official capacity. As soon as received, it was deposited in the government depository to the credit of the court. The

checks given to the appellees were signed by the clerk and countersigned by the judge in the name of the the court. They were non-negotiable in form, and payable only out of the fund deposited in the cause. Each was payable to one of the appellees in his own right, except the one intended for Mrs. Mettler, which was payable to Mr. Clark as her attorney of record. As Senator Culberson had not filed his assignment, the clerk distributed the fund in accordance with the transfer from Mrs. Mettler to Mr. Clark, and he reimbursed himself out of the proceeds of the check which he received as her attorney (Tr., 350). No receipt was given by Mrs. Mettler or in her name for the full amount of the judgment; she receipted only for her share. No one of the appellees gave a receipt for money paid on account of fees, or for money paid by the clerk in behalf of Mrs. Mettler; each receipted in his own name and right for the money paid directly to him and no more, and for that as paid on account of the judgment. We have seen how the interests of all parties became fixed and fully vested before the insurance company drew its check, and how the fund was disbursed in exact accordance with such interests. Here our search ends; for this traces the fund into the hands of those whom we seek to hold responsible, without the intervention of any money, negotiable instrument, or other thing by whose use our equities might be cut off.

4.

APPELLEES HAD NOTICE.

The appellant's position is: (1) That its funds having been taken from it by fraud, it has the right to recover them from the persons who got them, unless such persons are entitled to the protection which the law gives to those who purchase certain kinds of property for value and without notice of outstanding equities. (2) That the appellees are not entitled to

such protection, primarily for the reason that the property purchased by them, and through whose ownership alone they came into possession of the appellant's funds, was not such property as the law permits to be sold free from the equities of third parties; and, secondarily, because they did not purchase without notice of the appellant's claim.

None of the appellees knew at the time of acquiring his interest that Hunter was not dead. But Messrs. Clark, Spoonts and Culberson all knew that the insurance company claimed that he was living. The evidence does not show just how much information Phillips Investment Company had; but at least it was apprised of the fact that the insurance company was denying liability. The notice which the three lawyers had was not in the nature of hearsay. They were dealing directly with, and were seeking to overthrow, the company's contention that Hunter was still alive.

A statement by one person or his representative to another that the former has or claims a certain right is actual notice to the latter of that right. Notice and knowledge are two very different things; and a man may have actual notice sufficient for all legal purposes of something which he does not know and which even in the best of faith he wholly disbelieves. Suppose that A is about to buy from B land which B obtained in exchange for money embezzled from C. C believes the facts to be as they are, but is unable to prove them. He goes to A and states that B bought the land with money embezzled from him, and therefore holds it in trust for him ex maleficio. B always has stood well in the community; A has known him for years, and has entire confidence in him; C is unable to bring convincing proof of his charge. A concludes that C is a base maligner, and buys the land from B for full value. C afterwards discovers satisfactory evidence, and sues A for the

land. Can he not recover it? Has not A had actual notice? Probably no lawyer would doubt it. Yet wherein does this differ in principle from that which occurred in the present case? The appellees are affected with notice, not because they are lawyers, but because they knew as a matter of fact before they went into the case at all what the insurance company's position was. If this is not actual notice, but only constructive notice to lose its effect after reasonable inquiry, then it is impossible for a person so situated to give actual notice.

The heart of the company's right is the fact that Hunter is not dead but living. No matter how much fraud had been practiced in obtaining the judgment, if Hunter really had been drowned as alleged, the result of the suit would have been right, and the company could not have disturbed it. The fraud is a collateral matter, whose discovery serves no purpose other than that of enabling the appellant to avoid the effect of the adjudication obtained thereby, and get back to the original question whether it owed the money. Now, the appellant gave notice to the appellees that Hunter was not dead. N'importe that they did not believe it. Having before them its assertion that he was not dead, and their client's asseveration that he was, they took their chances, and proceeded with their speculative litigation. They cannot murmur if now it transpires that they believed the wrong party. They have no just ground of complaint at being asked to return the money which the company was compelled to pay them by the fraud of their client and her co-conspirator, made effective through their efforts. They knew all the time what the company's claim was, and knew that it would make that claim good by any and all lawful means. And they charged their client well for the risk they were taking. They proved that a reasonable attorney's fee in the case was $2,500, and recovered judgment accordingly,

though that sum was about $700 or $800 more than their pleadings warranted. Yet they received the aggregate sum of $12,867.75, more than five times the fee which they proved to be reasonable. For what was this huge addition intended? It was compensation to them for (among others) the very risk that now has developed.

CONCLUSION.

The appellant's theory of its case may be summarized as follows.

The appellees got possession of the plaintiff's money through the fraud of their co-defendant, Mrs. Smythe. Therefore it has a right of action at law against them to recover its money by them had and received, unless they are entitled to be protected as purchasers for value and without notice. But if it were to sue at law it would be met by a good plea of former adjudication. Hence it is compelled to resort to a court of equity to prevent the setting up of such a plea. The court of equity, thus having obtained jurisdiction, will proceed to grant full relief by itself ordering the return of the money if the circumstances require its restoration. No use of the judgment ought to be permitted, because it was procured by fraud practiced upon the court and the appellant in the litigation itself, and not merely by fraud wrought into the cause of action sued upon. The provisions of the seventh amendment to the constitution do not inhibit the exercise by this court of the power invoked; because the amendment must be construed in the light of its history, and at the time of its adoption, it had been for more than a century a rule of the common law to submit its verdicts and judgments to reexamination in chancery for fraud in their procurement.

For several reasons the appellees are not entitled to be protected as purchasers for value and without

notice. (1) Each of them received his part of the fund directly from the court in which the appellant had deposited it in satisfaction of the judgment; and in legal effect this is the same as if the appellant, acting under compulsion of the judgment, had given its own checks to the appellees for the portions by them severally claimed. (2) Each of them received what he got in right of ownership enjoyed by virtue of a previous assignment to him of an interest in the insurance policies, or in the judgment, or in the fund resulting therefrom. They cannot be protected as innocent purchasers of any one of these things; because no one of them possesses the property of being transferable free from existing equities. (3) They cannot be protected as purchasers without notice, for the additional reason that, with the possible exception of Phillips Investment Company, each of them had at the time of first acquiring his interest in the fund, or in that from which the fund arose, actual notice of the appellant's claim that Hunter was not dead, and that therefore it owed no one anything on account of the policies.

We do not dispute the general proposition that the rendition of professional services by a lawyer, or his contract to render such services, may form a valuable consideration for property conveyed to him as compensation therefor. But more than this is needed to block the pursuit of the real owner of the property seeking to recover it. Let us strip this case bare and look at it a moment. Mrs. Mettler is attempting to perpetrate a gross fraud upon the company, and finds herself unable to carry out her plan without a lawyer's assistance. She deceives a lawyer into believing that the company is trying to evade her just demands, and gains his co-operation by ceding to him the half of her claim, he knowing all the time precisely what the company's position is. Through his efforts, seconded by the continuance of

her dishonest practices, the fraud is made effective. Later, the facts are discovered, and restitution is sought. Now the lawyer says: "It is true that you did not owe my client a cent, and I must confess that her claim upon you was a wicked swindle. You were not deceived; you were guilty of no negligence; you fought all the time with sleepless vigilance; you told me what the facts were, and I knew your version of them before I engaged my services. But the woman fooled me. I believed her claim to be valid, and for a half interest in it I undertook to prosecute it for our joint benefit. I did so; and, aided by her continued fraud and perjury, I was stronger than you. After years of labor I got you down, and took your money away from you by the process of convincing a court that I was right and you were wrong, whereas in truth you were right and I was wrong. I gave half the money to the woman, and kept half myself. You may have back the woman's half, if you can find it. But for my half I worked hard, and gave to the woman a valuable consideration. I must have compensation for my services, even though it come from the one against whom they were rendered. A bird in the hand is worth two in the bush; and I prefer keeping your money which I have, rather than depending on the woman to pay me for the work which she deceived me into doing for her. By my alchemy her fraud has been transmuted into gold, and I purpose keeping it. I intend keeping even my part of the $4,300 and interest which you were compelled to pay as a penalty for not handing over your money immediately on demand." Now, this is no caricature. It is a fair paraphrase of the plea of purchase for a valuable consideration urged by the lawyer defendants. There is something radically wrong about a plea that presents such an ethical monstrosity; and we have endeavored to point out the defect. Usually it is true that what is right in

morals is right in law; but this case is an exception, if in a court of equity the appellant is not entitled to the restitution of all the money wrested from it by so outrageous a fraud.

In consideration of the premises, the appellant, The Fidelity Mutual Life Insurance Company, prays this court to reverse the decree of the court below, and to render a decree in accordance with the prayer of its bill.

MAURICE E. LOCKE,
EUGENE P. LOCKE,
Counsel for Appellant.

February 26, 1906.

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